

|                                                               |   |                                           |
|---------------------------------------------------------------|---|-------------------------------------------|
| <b>STATE OF SOUTH CAROLINA</b>                                | ) |                                           |
|                                                               | ) |                                           |
| <b>COUNTY OF GREENVILLE</b>                                   | ) | <b>LOCAL IDEA DUE PROCESS<br/>HEARING</b> |
| <b>C.S. and E.S. on behalf of their minor<br/>child L.S.,</b> | ) |                                           |
| <b>Petitioners</b>                                            | ) |                                           |
|                                                               | ) |                                           |
| <b>v.</b>                                                     | ) | <b>FINAL ORDER</b>                        |
|                                                               | ) |                                           |
|                                                               | ) |                                           |
| <b>Greenville County School District</b>                      | ) |                                           |
| <b>Respondent</b>                                             | ) |                                           |

This matter is before me pursuant to a Complaint and Due Process Hearing Request filed by the Petitioners through their legal counsel on August 19, 2019, received by me on August 23, 2019. On August 24, 2019, a letter was sent to said legal counsel informing the Petitioners of their rights and responsibilities in a Due Process Hearing. On August 29, 2019, the Respondent filed its Response via its legal counsel. Subsequently, the Petitioners' legal counsel withdrew and ultimately the Petitioners represented themselves.

On September 12, 2019, the Petitioners filed a Motion to Determine the Stay Put Placement for their child. On September 18, 2019, the Respondent filed a Response to the Motion and on September 23, 2019, an Order was issued establishing a general education 5K classroom with assistance from a teacher of the Deaf and Hard of Hearing (DHH) at the District's newly proposed elementary school utilizing the last agreed upon IEP from the 2018-2019 School Year as the service model.

On October 1, 2019 the parties held a teleconference and a Hearing date was established for November 4 through November 6, 2019. Subsequently, the parties agreed to Mediation, which occurred without a successful resolution to the issues raised by the parties.

The occurrence of the Mediation and a family emergency at the Petitioners' home gave rise to circumstances which mandated an extension of the IDEA forty-five day timeline. In addition, issues arose regarding language proposed by both parties for subpoenas that they sought. On October 28, 2019, an Order was issued which set new Hearing dates of November 13 through 15, 2019, with the exchange of documents and witness lists taking place on November 6, 2019. It also established the language to be utilized in any subpoena sought by the parties.

The required exchange occurred on the specified day and the Hearing commenced on November 13, 2019, and continued through November 15, 2019. By agreement of the parties the Final Order in this matter was to be issued on or before November 22, 2019.

#### FINDINGS OF FACT

Based on the testimony and evidence submitted at the Hearing, the following items are found to be factual:

1. The child suffers from a disability known as CHARGE Syndrome. This disability has caused him to be deaf and legally blind, although he has some vision. He also has orthopedic issues and a G tube.
2. The child attended an elementary school in the school district and was provided educational services in a 4K regular classroom with assistance from a DHH teacher and an Intervener during the 2018-2019 school year and made educational progress. (Testimony of District Personnel)
3. The parties engaged in six IEP meetings over the summer of 2019 without successfully agreeing to an IEP for the 2019-2020 school year. (Testimony of numerous witnesses, Petitioners' Exhibits 1,2,3,4,5 and 12)
4. Because of the rarity of CHARGE Syndrome, the Petitioners' sought the advice of numerous professionals who have experience with the syndrome and have provided substantial information to the Respondent's employees about the disability.

5. The Respondent's proposed IEP for the 2019-2020 school year offers the child educational services in a 5k resource classroom at a different elementary school, with direct services from a DHH teacher, an Intervener, with interaction with non-disabled children at lunch and recess. (Testimony of District Personnel).
6. The elementary schools nearest to the Petitioners are PES and GES, each within 10 minutes travel time. The newly recommended elementary school is approximately fifteen (15) miles from the Petitioners' home with a bus time of forty-five (45) to fifty (50) minutes. (Testimony of Director of Transportation, Petitioners' Exhibit 29)
7. Neither PES nor GES have a DHH teacher assigned to the schools for the 2019-2020 School Year. (Testimony of Principal for GES and Principal of PES).
8. Both the DHH teacher and the Vision teacher, testified they had previous experience with children with CHARGE Syndrome and deaf/blindness.

### ISSUES

The legal issues raised in pleadings and at the Hearing are as follows:

1. Did the Respondent District properly implement the child's 2018-2018 IEP?
2. Did the Respondent pre-determine the child's IEP and were the Petitioners allowed full participation in the IEP meetings and process?
3. Does the proposed 2019-2020 IEP offer services in the Least Restrictive Environment (LRE) for the child?
4. Does the 2019- 2020 IEP offer FAPE for the child?

Included within these legal issues are a number of additional matters that must be discussed in order to reach a decision in the matter. They will be dealt with in the discussion which follows.

## DISCUSSION

Prior to discussing the specific issues in this case, because of the emotional nature and intensity of parents and the testimony presented, some general comments are in order. First let me say, the Petitioners are amazingly dedicated parents who have spent hundreds of hours learning about their child's disability and fighting for his educational and other needs. Their knowledge and persistence are to be commended and respected.

In addition, the dedication, ability and commitment shown by the Respondent's professionals are equally amazing. They have also gone above and beyond their job responsibilities to familiarize themselves with CHARGE Syndrome and the services the child will need to expand his learning and abilities.

The unfortunate thing in this case is that the Petitioners believe there is only one way to educate their child and the Respondent's professionals believe there may be other options. The conflict is very reminiscent of the struggle between parents and school districts in the 1980's and 1990's relating to the education of children with Autism. The recognition of Autism and its various debilitating symptoms was relatively new at the time and non-education scholars and medical practitioners believed that there was only one method of teaching the children. Education professionals believed that there were a variety of strategies that would work. Eventually, all agreed that Autism was a disability with a spectrum of symptoms and each student had to be looked at individually. While all issues relating to educating Autistic children have not been fully resolved, numerous court decisions and some modifications of the education strategies have allowed parents and school districts to find some mutual agreement as to how these children can be educated.

Similarly, the incidence of students with CHARGE Syndrome is rare and parents and educators alike are learning how to best educate these children. Non-educational professionals and educators have not yet come to an understanding as to one strategy. It also appears that children with CHARGE are on a spectrum and must be dealt with individually as opposed to as a group. Hopefully, as more knowledge and experience are obtained by both parents and educators, agreement will emerge as to appropriate methods to utilize in the education of these children because both have knowledge that can benefit the child's education.

That being said, the decision in this case must be made based on the evidence and testimony presented at the Hearing and nothing more. It also must be made by applying the law of the statute, regulations and court decisions to the information obtained from that evidence and testimony.

1. Did the Respondent properly implement the child's 2018-2019 IEP?

The Petitioner attempted to prove that the Respondent failed to provide the full compliment of hours of direct DHH services to the child. Their contention seemed to be based on the fact that nap time in the classroom interfered with the delivery of services and cut the time short. As a result, they alleged that the Respondent had not implemented the 2018-2019 IEP properly and asked for compensatory education to make up the time lost.

The DHH teacher testified that when she realized nap time was going to interfere with her time with the child, she would come to the classroom early or stay after she was supposed to leave to work with the child. Also, she would work with him at recess or during nap time if he was awake, in order to ensure that he was receiving the required time. The Petitioners did not offer any credible testimony to contradict her assertion. Their assertion seemed to be based

on the fact that nap time took up to 30 minutes away from the portion of the day that the DHH teacher was scheduled to be in the classroom.

All parties seemed to agree that the child made meaningful educational progress during the 4K school year utilizing a general education model with direct service from a DHH teacher. Based on the testimony of teacher of the DHH and the classroom teacher, I do not find any substance to this issue or that compensatory education is appropriate.

2. Did the Respondent pre-determine the child's IEP and were the Petitioners allowed full participation in the IEP meetings and process?

It is the position of the Petitioners that because the Respondent utilized a Draft IEP and made certain assumptions regarding the child's needs that the IEP and placement was predetermined. Their desire was that the child be educated in a general education 5K classroom with a teacher of the DHH assisting just as she had been done in 4K at GES or PES. The Respondent District believed that based on the child's language deficit, the 5K general education curriculum and classroom would be too difficult for the child and that he would need assistance in a resource service delivery classroom with more intense direct services from a teacher of the DHH at the newly proposed elementary school.

The testimony is clear that the Respondent offered a draft IEP for each of the six IEP meetings and that each contained changes and modifications based on what happened at the prior meeting. In addition, several of the changes were the result of input from the Parents and their expert presenters. It is well established that when a District prepares a *draft* IEP for discussion and the parents offered suggestions some of which were adopted, no predetermination occurred, J.D. by Davis v. Kanawha County Bd of Educ., 48 IDELR 159 (S.D. WV 8/3/07); TP & SP ex rel SP v. Mamaroneck Union Free Sch Dist 554 F.3<sup>rd</sup> 247, 51 IDELR 176 (2<sup>nd</sup> Cir 2/3/09). Thus, based on the predetermination issue alone the Petitioners were

not denied meaningful participation.

However, that is not the only reason the Petitioners believe they were denied meaningful participation. They also believe that the District did not properly act on the advice of their expert and on their suggestions. It was, and is, the Petitioners' belief that they alone know what is best for their child's education and as a result, they continued to seek IEP meetings and utilize the rarity of children with CHARGE Syndrome in the school district as the basis for their beliefs. The Respondent's teachers and service providers heard information from the Parents' consultant, a noted expert on CHARGE Syndrome, at the IEP meeting. They also attended a separate in-service training provided by the South Carolina Deaf Blind Project where the expert again had input. In addition, several of the teachers testified that on their own they read materials provided by the parents and others as to the education of children with CHARGE. Several testified that they had prior experience with children having the CHARGE Syndrome or who were deaf or deaf and Blind. Even in the face of those experiences and efforts by District personnel, the Petitioners continued to demand a placement in a general education 5k classroom with DHH assistance in the room at an elementary school where those concentrated services were not available.

In JD by Davis v. Kanawha County Bd of Educ., *ibid*, the Court ruled that although parents have a right to meaningful participation in the IEP process they do not have a right of dominate the process. The Court found that the parent hijacked and derailed the IEP team process. In this case, the Petitioners not only attended every meeting, they caused the adjustment of Team agendas, attempted to impose their will on the IEP team and intimidated some of its participants. To say they did not have meaningful participation would be contrary to the facts.

Simply because their wishes regarding placement did not prevail, does not mean that they did not have meaningful participation. *see* Independent Sch Dist of Boise No. 1 110 LRP 32057 (SEA Idaho 3/23/10); In re Student with a Disability 52 IDELR 306 (SEA NY 4/12/09).

3. Does the proposed 2019-2020 IEP offer services in the Least Restrictive Environment (LRE) for the child?

The IDEA clearly establishes the principal of educating a disabled child in an environment which allows him to be educated, to the extent possible, with non-disabled peers

“to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”  
20 U.S.C. 1412(5)(B).

In this case the Petitioners insist that to be in compliance with this portion of the law the child must be educated in a regular education 5K classroom with in-class DHH services as was the case in 4K. The Respondent’s members of the IEP team believe the child is in need of more intense services because his “window of learning language” is closing. (Petitioners’ Exhibit 42, Testimony). Their position is based on the belief that a child absorbs learning best up to age five and in this child’s case he is four years old, almost five, and his current language level is that of a child of 18 to 24 months old child. Thus, if the three-year language deficit is to be minimized, he would need more extensive, one on one services in the current school year. They testified that without language, the child cannot learn to read, do math or communicate. As a result, they believe his Least Restrictive Environment (LRE) is in a resource-service delivery classroom with intensive language assistance from a DHH teacher. In addition, he could interact with his disabled and non-disabled peers at lunch and recess as well as other appropriate settings.

In Oberti v. Board of Educ., 801 F. Supp. 1392 (D.N.J. 1992) the Court established a two-part test. 1) can the regular classroom with supplemental aids and services be satisfactorily achieved for the student; and 2) if not, has the student been mainstreamed to the maximum extent appropriate. Here, the Respondent could have very well have recommended a self-contained class but instead offered a Resource classroom which is less restrictive but offers the intensive education setting needed to address the child's language deficit. This placement offer meets the *Oberti* test.

4.e Does the 2019- 2020 IEP offer FAPE for the child?

FAPE literally means a free appropriate public education. There is no contention that the education offered to the child in this case is not "free and in the public-school system". The issue here is whether or not it is "appropriate".

The initial case decided by the United States Supreme court interpreting IDEA was Board of Educ. v. Rowley, 458 U.S. 176 (1982). In this case, the Court made several important rulings which remain the bedrock for all subsequent court decisions interpreting various portions of the IDEA and its implementing regulations 34 CFR 300. The decision established LRE, IEPs, and the need to provide all disabled children with an appropriate public education. It also established that a disabled child must be offered and receive an education, which is designed to provide educational progress but, in a moment of practicality, it stated that the educational program offered need not be the optimum program but one which would provide educational progress. A recent U.S. Supreme Court decision, Endrew v. Douglas County Sch Dist RE 1 580 U.S. \_\_\_, 137 S. Ct. 988; 197 L.Ed. 2d 335, seemed to emphasize that the educational program must clearly be designed to provide "meaningful" educational progress which is appropriate for the child's circumstances.

In this case, the child's CHARGE Syndrome offers several challenges. He is deaf; legally blind with some visual ability, which will most likely not improve significantly; has some orthopedic limitations; and he has a G tube because of digestive difficulties. His physical limitations require the availability of medical personnel who can treat him if his G-tube comes loose or is dislodged and other potential medical issues.

His hearing and visual disabilities require DHH professionals with extensive sign

language and other skills who can communicate with him. In his 4K classroom, a teacher of the DHH provided language and communication training on a limited basis and he did learn socialization skill from the environment and other children. He made progress and the Petitioners were pleased, particularly because the school was close to their home.

However, his progress did not significantly cut into his language deficit. The new IEP offered for school year 2019-2020 (Petitioners' Exhibit No. 1) is more intensive and designed to begin to make gains with regard to the child's language deficit. Such a program is not available at the PES or GES. The proposed program is located at an elementary school, which is approximately 15 miles away from the Petitioner's home. There are 5 nurses on campus who are trained to replace and deal with G tubes and other medical conditions. Such is not the case at PES or GES. The DHH teachers at the newly proposed elementary school are very experienced, knowledgeable and have had experience educating children with CHARGE Syndrome. Such is not the case at PES or GES.

The real issue seems to be the travel time between the Petitioners' home and the school. They believe that such a long commute will cause the child to be fatigued, which is a symptom of CHARGE and can be detrimental to his health and education. The transportation director testified that the ride on a bus for students with disabilities to and from the new elementary school could be 45 to 55 minutes. Admittedly a long time for any 4 or 5-year-old student and a real problem for a child with a disability. He also indicated that a nurse could be on the bus if needed as well as the child's intervener. This apparently did not convince the Petitioners to accept the bus ride. He also indicated that the Respondent does allow parents to contract with private individuals or companies to provide transportation for their child and the Respondent will pay mileage. Such a direct vehicle ride would be more like 15 or 20 minutes depending on traffic.

The Petitioners also believe that the proposed IEP did not offer their child a FAPE because of the location of his educational program in a resource-service delivery classroom with other students with disabilities. This IEP was developed over six meetings and with a lot of input from professionals with experience in CHARGE and Deaf-blindness. It sets forth meaningful goals and objectives. It allows for socialization as well as direct education. It provides for a variety of educational stimulus that would not be available in a regular education 5K classroom.

Finally, the Petitioners offered several other issues which did not end up being the focus of the Hearing:

1. There was a question raised about the methodology being used by the Respondent. The Petitioners' were requesting that a particular program, Foundations in Literacy, be used instead of the one offered by the District. It is well settled that parents cannot compel a specific methodology, Lessard v. Wilton-Lyndeborough Cop Sch Dist 592 F. 3<sup>rd</sup> 267, 53 IDELR 279 (1<sup>st</sup> Cir 1/20/10).
2. Because of some mention of the child having behavior issues, the Petitioners contended that the child should have a behavioral intervention plan (BIP). Respondent witnesses indicated that his behavior was not a problem and in fact, it was rather typical of a four-year-old child with a disability which caused him to become frustrated or fatigued from time to time.
3. The Petitioners offered a co-teaching model for delivery of services in a regular education classroom instead of the proposed resource-service delivery classroom, again, a methodology issue. Because of the child's language deficit, the program offered in the IEP appears to be far superior to that offered by the Petitioners. In addition, he will have multiple service providers, an aide, and his Intervener working with him under the proposed IEP.

### DECISION

Decisions in these IDEA due process hearings are always couched in emotion and are never easy. But when you apply the existing law to the facts, issues sometimes become clearer. In this case, it is totally understandable that the Petitioners are protective of their child. CHARGE Syndrome is a serious disability which can impact learning but also impacts the very wellbeing and life of the child. Wanting their child to be close to home and in as normal an environment as possible is certainly understandable.

The Respondents teachers and service providers in this case are caring, experienced, skilled professionals and frankly, based on their testimony and history, extraordinarily capable. Each are parents, at least one having a handicapped child. They all expressed real affection for the child.

Fortunately for us, the child spent two full days in the Hearing. He was delightful and well behaved. He spent most of the time utilizing visual devices and seemed to enjoy

meeting people. It was clear that all the participants wanted the best for this child. They just viewed that goal from different perspectives.

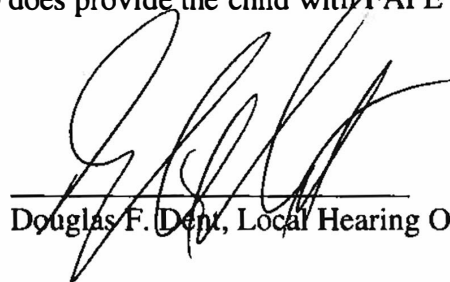
In this case, the Petitioners brought the action, thus they have the burden of persuasion. Based on the testimony and evidence presented, applying the law to the facts, they did not meet that burden and each of the identified issues must be decided in favor of the Respondent. That does not mean that the Petitioners do not have arguments which deserve respect. It just means that the law does not support their view of the case.

***THEREFORE***, it is the Order of this Hearing Officer that:

1. The Respondent did properly implement the child's 2018-2019 IEP.
2. The Respondent did not predetermine the child's 2019-2020 IEP and the Petitioners did have meaningful participation in the IEP development.
3. The proposed placement at the new elementary school using a resource-service-delivery model is the LRE for this child given his need for intensive language instruction.
4. Given the distance from the Petitioners home, the Respondent shall contract with a person or organization of the Petitioners' choice to provide direct transportation of the child to and from school.
5. The proposed IEP for the 2019-2020 does provide the child with FAPE and should be implemented.

***IT IS SO ORDERED.***

November 22, 2019  
Greenville, South Carolina



Douglas F. Dent, Local Hearing Officer

### **APPEAL**

Should either party wish to appeal this ruling they may do so by writing a letter to the South Carolina Department of Education, Office of General Counsel, 1429 Senate Street, Rutledge Building, Columbia, South Carolina 29201 within ten (10) days of receipt of the Hearing Officer's Order.