

FINDINGS OF FACT AND DECISION

Case Number: 163221

Student's Name:

Date of Birth:

District:

Hearing Requested By: Parent

Date of Hearing: December 1, 2016
January 23, 2017
March 8, 2017
March 20, 2017

Actual Record Closed Date: May 1, 2017

Hearing Officer: Jeffrey Guerra, Esq.

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NAMES AND TITLES OF PERSONS WHO APPEARED ON DECEMBER 1, 2017

For the Student:

, Attorney (Via Telephone)

For the Department of Education:

, District Representative (Via Telephone)

NAMES AND TITLES OF PERSONS WHO APPEARED ON JANUARY 23, 2017

For the Student:

, Attorney (Via Telephone)

For the Department of Education:

, District Representative (Via Telephone)

NAMES AND TITLES OF PERSONS WHO APPEARED ON MARCH 8, 2017

For the Student:

, Attorney

For the Department of Education:

, District Representative

, (Via Telephone)

, (Via Telephone)

NAMES AND TITLES OF PERSONS WHO APPEARED ON MARCH 20, 2017

For the Student:

, Attorney

, Parent

, (Via Telephone)

For the Department of Education:

, District Representative

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INTRODUCTION AND PROCEDURAL BACKGROUND

On September 28, 2016, the New York City Department of Education (hereinafter, "DOE" or "District") appointed the undersigned to act as the impartial hearing officer (hereinafter, "IHO") in a case brought under the Federal Individuals with Disabilities Education Act [20 USC § 1415(f)(3)] ("IDEA") and the applicable provisions of the Regulations of the Commissioner of Education [8 NYCRR 200.5] by the parent of [redacted] (hereinafter "the Student"). The Parent requested the hearing by filing a due process complaint that was filed with DOE on September 13, 2016.

After preliminary and/or ancillary determinations this matter was scheduled for hearing on March 8, 2017 and March 20, 2017, wherein substantive testimony and evidence was received by this IHO and more particularly summarized elsewhere in this decision. The parties elected to provide written summations and memoranda that were received by this IHO and admitted into evidence as IHO Exhibits I and II. Where appropriate and after careful consideration of the cumulative impact of the criteria set forth in the Regulations of the Commissioner of Education certain extensions were granted of the timeline. The record ultimately closed on May 1, 2017.

FINDINGS OF FACT**NEW YORK CITY DEPARTMENT OF EDUCATION CASE**

The Department of Education's first witness was [redacted] [redacted] who testified telephonically she is a teacher employed by the Department of Education at Committee on Special Education [redacted]. (*Transcript*, Pg. 43) She testified she participated in the CSE review meeting on February 2, 2016 for a triennial review as the special education teacher for the Board and the District representative. (*Transcript*, Pg. 45) She further testified she visited [redacted] last year. (*Transcript*, Pg. 48) Ms. [redacted] testified she reviewed the current [redacted] and the [redacted] during the meeting. (*Transcript*, Pg. 50) She testified based on the evaluations, the child, [redacted] [redacted]. [redacted] [redacted]. (*Transcript*, Pg. 51 and 52) Ms. [redacted] further testified the parent's input was in agreement with the school. (*Transcript*, Pg. 52) Ms. [redacted] testified

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that everyone agreed that he would benefit from a [redacted], which is a [redacted] [redacted]. The program was [redacted] [redacted] [redacted] [redacted] [redacted] [redacted] [redacted] [redacted] in addition to the current services of [redacted]. (Transcript, Pg. 53) She also testified that they discussed [redacted] at the [redacted] but [redacted] [redacted] [redacted] [redacted] [redacted] [redacted] [redacted]. (Transcript, Pg. 54) Ms. [redacted] testified that [redacted] wanted to make sure [redacted] [redacted]. (Transcript, Pg. 55) She testified it was also explained to the parents that [redacted]. (transcript, Pg. 55) She also testified that the IEP created on February 2, 2016 could be implemented in public schools. (Transcript, Pg. 56) She further testified she observed [redacted] on in the classroom during the 2015/2016 school year. (Transcript, Pg. 58) Ms. [redacted] testified that the recommendation for a [redacted] was for a [redacted] [redacted] [redacted] [redacted] [redacted] [redacted] [redacted]. (Transcript, Pg. 71) She further recommended [redacted] [redacted]. (Transcript, Pg. 73)

The District's second witness was [redacted] who testified telephonically she has been the [redacted] at [redacted] for [redacted] years. (Transcript, Pg. 83) She testified the the program has [redacted] and [redacted] and the majority of the students are in a [redacted] population. (Transcript, Pg. 84) She further testified she has [redacted] programs and had a seat available for the 2016/2017 school year. (Transcript, Pg. 85) Ms. [redacted] testified they have a [redacted] [redacted], a [redacted] and an [redacted]. (Transcript, Pg. 86) Ms. [redacted] also testified that attendance during [redacted] for [redacted] school is mandatory depending on an IEP. (Transcript, Pg. 86) She testified that [redacted] [redacted]. (Transcript, Pg. 90) She further testified [redacted] was offered placement at the school but was not on the register. (Transcript, Pg. 91) Ms. [redacted] testified that the school has the services and would be implement [redacted] in a [redacted]. (Transcript, Pg. 92)

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The parent's first witness was [] who testified he is the [] at []. (*Transcript*, Pg. 112) He testified he works with the teachers to create an individualized curriculum for each student, evaluates the student's progress three times a year and participates in all the CSE meetings. (*Transcript*, Pg. 112 and 113) He further testified [] [] (*Transcript*, Pg. 115) Mr. [] testified the school has [] [] [] [] [] [] [] [] [] (*Transcript*, Pg. 116) He testified the school has [] (*Transcript*, Pg. 119) He further testified he has known [] since he started with the program in 2009 in which he is progressing well. [] was accepted as a student for the 2016/2017 school year (*Transcript*, Pg. 121) Mr. [] testified [] [] and is currently in a classroom with [] [] (*Transcript*, Pg. 122) He also testified [] is appropriately paired. (*Transcript*, Pg. 123) He further stated the [] [] curriculum in the school is appropriate to []'s needs as he requires []. (*Transcript*, Pg. 131) Mr. [] testified they [] [] (*Transcript*, Pg. 140) He also testified [] receives [] [] (*Transcript*, Pg. 143 and 145) Mr. [] testified the [] os taking is appropriate because he can now []. (*Transcript*, Pg. 152) Mr. [] stated he participated in the CSE review meeting on February 2, 2016. in which a [] was recommended. (*Transcript*, Pg. 156) The program recommended was a [] he felt was not appropriate. (*Transcript*, Pg. 157) He also testified there was no discussion regarding no availability for a [] [] or regarding a [] [] []. (*Transcript*, Pg. 159)

The parent's second witness was the mother, []. (*Transcript*, Pg. 172) She also testified she put [] in [] because she felt a new environment would help him. (*Transcript*, Pg. 174) She further testified he is doing much better []. (*Transcript*, Pg. 174) Ms. [] testified she believes it

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is appropriate for [REDACTED]. (*Transcript*, Pg. 175) She also testified [REDACTED] is providing an appropriate educational program. (*Transcript*, Pg. 175) She further testified as of February 15, 2017 she has not paid the balance to the school because she does not have the money. (*Transcript*, Pg. 176) Ms. [REDACTED] testified she participated in the CSE review meeting on February 2, 2016 via phone where a [REDACTED] [REDACTED] was recommended with [REDACTED]. (*Transcript*, Pg. 179) She further testified she sent a letter to the school stating they did not live up to the services she believed [REDACTED] would have including a [REDACTED]. (*Transcript*, Pg. 181) She was further concerned that [REDACTED] [REDACTED] and [REDACTED]. (*Transcript*, Pg. 182) Ms. [REDACTED] testified the DOE did not accept her letter and remained with their placement. (*Transcript*, Pg. 184)

CONCLUSIONS OF LAW

The purpose of the IDEA is “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs.” (*Bd. Of Educ. V. Rowley*, 458 U.S. 176, 179-91 (1982)) Implicit in the congressional purpose of providing access to a free and appropriate public education (hereinafter “FAPE”) is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicap child. (*Id.*)

Pursuant to 20 U.S.C. §1401(9) and 34 C.F.R. §300.17 FAPE is defined as follows:

Special Education and related services that are provided at public expense under public supervision and direction and without charge; meet the standards of the SEA... include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP).

In deciding whether the Respondent provided a student with a FAPE, the inquiry is typically: (1) whether the Respondent complied with the procedures set forth in IDEA; and (2) whether the student’s IEP is reasonably calculated to enable the student to receive

educational benefit (*Rowley, supra.*). Under the second prong, a school district need not maximize the potential of child but must open the door of public education in a meaningful way, and the IEP must provide the opportunity for more than only a “trivial advancement” (*P. v. Newington Bd. Of Educ.*, 546 F.3d. 111 (2nd Cir. 2008)).

The IEP is “the centerpiece of the statute’s education delivery system for disabled children” (*Honig v. Doe*, 484 U.S. 305, 311 (1988)). An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides appropriate specialized instruction and related services (see 34 C.F.R. §300.320 (a)) For an IEP to be “reasonably calculated to enable the child to receive educational benefits,” it must be “likely to produce progress, not regression” (*Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998)).

Additionally, each public agency must ensure that, as soon as possible following the development of an IEP, special education and related services are made available to the child in accordance with the child’s IEP. In order to implement the IEP, a team that includes the child's parents determines where the child should be placed based on the child's IEP. Thus, the placement should not dictate the IEP but rather the IEP determines whether a placement is appropriate. (*Rourke v. District of Columbia*, 460 F.Supp.2d 32, 44 (D.D.C. 2006)).

The DOE must ensure that the IEP team reviews a student’s IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved. Moreover, the DOE must ensure that the IEP team revises the IEP, as appropriate, to address any lack of expected progress toward the annual goals; and the results of any reevaluation or information about the child provided to, or by, the parents. Additionally, if the parent obtains an independent educational evaluation (“IEE”) at public expense, or shares with the public agency an evaluation obtained at private expense, the school district must consider the results of the evaluation, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child. The IDEA mandates that an IEP be based on the results of the most recent evaluation of a student.

In determining the appropriate placement for a child, preference is given to the least restrictive environment and the appropriate schools nearest the child's home (*Id.*). The IDEA requires that unless the IEP of a child with a disability requires some other arrangement, the child is too educated in the school that he or she would attend if the student was otherwise not disabled. In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of the services that he or she needs. A child with a disability is not removed from education in age appropriate regular classrooms solely because of needed modifications in the general education curriculum (*See 34 C.F.R. § 300.116*).

In cases where the relief sought is tuition reimbursement or reimbursement for other services a three-prong approach delineated in *Burlington School Comm. V. Dept. of Education* (471 U.S. 359 [1985]) and its progeny has developed. It is therefore necessary to determine if (1) the services offered by the school district were inadequate or inappropriate and therefore resulted in a denial of FAPE; (2) the services selected by the parents were appropriate; and (3) equitable considerations support the parent's claim.

Pursuant to *New York Education Law §4401(c)(1)* the DOE shall have the burden of proof, the burden of persuasion, and the burden of production in impartial hearings except for instances where the parent is seeking tuition reimbursement for a unilateral parental placement and in those cases the parent shall have the burden of persuasions and the burden of production as to the appropriateness of the placement. The burden of proof in matters such as this shall only be met upon a fair preponderance of the evidence. The preponderance of the evidence standard requires that the trier of fact to find that the existence of a fact is more probable than its nonexistence (*Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993)).

Unlike other standards of proof, the preponderance-of-evidence standard allows both parties to share the risk of error in a roughly equal fashion, except that when the evidence is evenly balanced, the party with the burden of persuasion must lose (*Director, Office of Worker's Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994)).

DISCUSSION**Provisioning of a Free and Appropriate Education**

Almost all requests for relief have a basic threshold question, whether or not the District provisioned a FAPE for this Student. Pursuant to *New York Education Law §4401(c)(1)* the District must bear the burden of proving that the Student was provisioned a free and appropriate education. As is in most cases, the Individualized Education Program (IEP) become the focal point for this determination. If the district presents sufficient witnesses and evidence to support the claim that the IEP was reasonably calculated to confer an educational benefit for this Student then the District has met its burden.

“Reasonably calculated” as the phrase suggests is not meant to be an insurmountable burden for the district. The IDEA envisions a collaboration of educators, diagnostic professionals and the parent’s working together as a team to develop a program and plan for students with unique and special needs. As with all groups, reasonable people can disagree as to the “best” or “most appropriate” course of action to any particular problem. These types of disagreements should be resolved in a collaborative effort and the leader of the CSE team should attempt to build consensus among the differing viewpoints. Ultimately, only one plan can be developed and it rests with the CSE to develop that plan.

If an IEP is carefully and thoughtfully crafted it should be readily clear as to the reasoning behind the service plan and goals for the Student. In the instant case the central disagreement of the provisioning of FAPE is that the proposed placement as identified by the District could not implement the IEP as written. While the parties may continue to disagree as to the provisioning of services the IEP generated by the District becomes the minimum the parties should be expected to provide. In the instant case the testimony is clear that the District’s placement could not implement the IEP as written. The IEP requires that the Student be placed in a [redacted] [redacted]. The testimony states that the Student would have only received [redacted] [redacted]. Moreover the school while offering ESP could not offer the programming requirements as stated in the IEP.

In the instant matter the parent requested a reconvene to address the perceived deficits of the proposed placement, it was at this time the parties could have reconvene to discuss the issues and perhaps make modifications should they have been necessary to ensure the student was provided a FAPE. However, the District declined to do so dismissing the parental concerns “out of hand”. This *sua sponte* decision failed to address the practical limitations of the placement and denied the parent an opportunity to further participate in the placement decision for the Student.

The Appropriateness of the Unilateral Placement

In the instant matter, the parents have established by a fair preponderance of the evidence the progress that the Student has made while at [] during the 2016-2017 school year. The Parent's have further proven that the program is a []

is the fact that

(Ex. E,

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F; Tr. 115-6). The record also established the unique needs of the Student have been addressed in individualized and meaningful ways by the school and its personnel in order for the Student to make progress while at the placement. (Ex. F; Tr. 127-8).

Based on the foregoing, I find that the parent's unilateral placement is appropriate.

Equity Determination

With respect to the relief of tuition reimbursement an assessment must be made as to equitable determinations. This determination, in essence is a whether or not the parent's acted in good faith with the district. Much like the District is required to not "pre-determine" a plan or placement before the IEP meeting, so too are the parents required not to "pre-determine" a particular placement of their child. This requirement embodies the idea that the CSE meeting is meant to be collaborative approach where all parties are participating meaningfully.

In the instant matter, the District argues the conclusory premise that the Parent's had no intention of enrolling the child in the placement. The basis of this conclusion from the District relies on the fact that the student was never enrolled in the public school placement and that the Parent's have yet to remit meaningful payment to the private school placement and collection efforts of the school have not been implemented.

While the issues of payment are supported by the record the conclusion that the Parent's acted in bad faith and thus equities do not favor them is not. The Parent testified that had a public school placement been provided the Student would have been enrolled and no evidence provided by the District even suggests that this statement was disingenuous of the Parent.

I therefore find that equities favor reimbursement.

ORDER

BASED ON THE FOREGOING, IT IS,

ORDERED that the District failed to provision a FAPE to the Student for the 2016-2017 school year, and it is further;

ORDERED that the Parent's have met their burden in establishing the appropriateness of the unilateral placement, and it is further;

ORDERED that the no equitable considerations exist the would reduce or

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eliminate the tuition reimbursement, and it is further;

ORDERED that the District is directed to directly fund the Student's tuition at for the 2016-2017 school year in an amount not to exceed representing the at the private placement, and it is further;

ORDERED that all relief not specifically granted is DENIED.

Dated: May 12, 2017

JEFFEREY GUERRA, ESQ.
Impartial Hearing Officer

JG:

PLEASE TAKE NOTICE

The parent and/or the New York City Department of Education has a right to obtain a review of this decision by a State Review Officer of the New York State Education Department under Part 200.5(k) of the Regulations of the Commissioner of Education, Section 4404 of the Education Law, and the Individuals with Disabilities Education Act.

**Directions and forms can be found on the Office of State Review website:
<http://www.sro.nysed.gov/RevisedRegulationsOverview.html>**

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DOCUMENTATION ENTERED INTO THE RECORD

PARENT

- A Impartial Hearing Request, 9/9/16, 7 pages
- B Notice of Placement, 6/20/16, 6 pages
- C Amended Notice of Placement, 6/21/16, 6 pages
- D Letter from CSE Chairperson to Parent, 7/27/16, 1 page
- E [REDACTED] Program Description, undated, 1 page
- F [REDACTED] Curriculum, 2016-2017, 13 pages
- G [REDACTED] Class Schedule, 2016-2017, 1 page
- H [REDACTED], 2016-2017, 1 page
- I [REDACTED] Mid-Year Evaluation/Progress Report, 12/8/16, 10 pages
- J [REDACTED], 12/8/16, 1 page
- K [REDACTED] Enrollment Contract, 6/20/16, 1 page
- L [REDACTED] Payment Affidavit, 2/15/17, 1 page
- M 2015 Form 10140A (Relevant Portion), 2015, 1 page

DEPARTMENT OF EDUCATION

- 1 DOE IEP, 2/2/16, 17 pages
- 2 School Location Letter, 6/2/16, 1 page
- 3 [REDACTED], 12/2/15, 8 pages
- 4 Conference Minutes, 2/2/16, 2 pages
- 5 [REDACTED], 7/27/16, 1 page
- 6 [REDACTED], 12/1/15, 3 pages

IMPARTIAL HEARING OFFICER

- I District Summation and Brief, 4 pages
- II Parent's Summation and Brief, 35 pages