

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
17 EDC 06571

<p>█ a minor by parent or guardian █ █ Petitioner, v. Charlotte-Mecklenburg Schools Board of Education Respondent.</p>	<p>FINAL DECISION</p>
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THIS MATTER was heard before the undersigned Administrative Law Judge, Selina Malherbe, on January 2-5, February 27-28, and March 1-2, 20 and 23, 2018 in the Mecklenburg County Courthouse, Charlotte, North Carolina.

APPEARANCES

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WITNESSES

For Petitioners:

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Dr. Trish Gibson
Ms. Tracy Vail
Belen Couk
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Laura Lee
Sharon Welling

For Respondents:

Amanda McPeters
Eric Bailey
Jessica Conner
Caroline Overcash
Lauren Micho
Stephanie Dorton

MOTIONS

Various prehearing motions were made prior to and during the hearing and rulings were made on the record. Of particular note for this written decision: Respondent’s Motion In Limine was granted, establishing that the statute of limitations precludes all matters occurring prior to October 2, 2016 (Transcript “Tr.” Vol. I, pp. 11-13); and Petitioner’s Motion In Limine was granted, precluding all matters that occurred after October 2, 2017 (Tr. Vol. VI, p. 53).

EXHIBITS

For Petitioners: Exhibits 1-9, 11-28, 31, 34, and 37-52.

For Respondents: 1, 3-35, and 39-42.

ISSUES

The Parties stipulated to the following issues in the Pre-Trial Order:

1. Whether the Petitioner has borne her burden of demonstrating that Respondent denied ██████████ a free and appropriate public education by failing to place ██████████ in the least restrictive environment for the 2017-18 school year.

2. Whether the Petitioner has borne her burden of demonstrating that Respondent denied [REDACTED] a free and appropriate public education by placing [REDACTED] in a separate school for the 2017-18 school year.
3. Whether the Petitioner has borne her burden of demonstrating that Respondent denied [REDACTED] a free and appropriate public education during the 2016-17 and 2017-18 school years by failing to develop and implement appropriate behavior interventions.
4. Whether the Petitioner has borne her burden of demonstrating that Respondent denied [REDACTED] a free and appropriate public education during the 2016-17 school year by failing to develop appropriate IEPs.
5. Whether the Petitioner has borne her burden of demonstrating that Respondent denied [REDACTED] a free and appropriate public education during the 2016-17 school year by failing to provide appropriate related services.
6. Whether the Petitioner has borne her burden of demonstrating that Respondent denied [REDACTED] a free and appropriate public education during the 2016-17 school year by failing to allow Petitioner's mother to meaningfully participate in all IEP meetings and predetermining placement on June 1, 2017.
7. Whether the Petitioner has borne her burden of demonstrating that Respondent denied [REDACTED] a free and appropriate public education by refusing to provide Petitioner's mother with Independent Educational Evaluations ("IEEs") upon her formal and written requests and failing to file for a due process hearing to show that its evaluations were appropriate.

FACTS

A. Factual Stipulations

The parties stipulated to the following facts in the Pre-Trial Order:

1. The Petitioner [REDACTED] name is [] ("Student"). Student's mother is [REDACTED] ("Mother"). Student resides with her mother. Student is domiciled within the boundaries of Mecklenburg County, NC.
2. Respondent, Charlotte-Mecklenburg Board of Education, is a public school district ("the District") located in Charlotte, NC, Mecklenburg County.
3. The parties named in this action are properly before this Tribunal, and this Tribunal has personal jurisdiction over them.
4. As the party seeking relief, the burden of proof for this action lies with Petitioner. See *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

5. Student is a [REDACTED] grade student at [REDACTED] School, located in [REDACTED] Charlotte, NC, and operated by the Respondent. Student started her [REDACTED] grade school year at [REDACTED] School on [REDACTED]. Student is currently [REDACTED].
6. [REDACTED] School is a separate school for Exceptional Children (“EC”) in the District.
7. Student has attended schools within the District for her entire educational career, which began in [REDACTED].
8. Respondent has provided special education services to [REDACTED] under the IDEA and North Carolina laws and Policies Governing Services for Children with Disabilities since pre-kindergarten ([REDACTED] school year) under the following special education eligibility categories: Developmental Delay, Intellectual Disability – Moderate, and Autism.
9. Student’s placement has progressed from the Regular setting, to Resource, to Separate level, in both a self-contained Specialized Academic Curriculum (“SAC”) classroom and self-contained Autism (“AU”) class, and now a Separate School.
10. The IEP Team met on March [REDACTED], 2014 and decided to conduct comprehensive evaluations of Student in the following areas: OT, educational, psychological, intellectual, motor, and autism.
11. An educational evaluation was completed on 3/[REDACTED]/2014.
12. The Brigance Diagnostic Inventory of Early Development II was conducted on 3/[REDACTED]/2014.
13. An Adaptive Behavior evaluation was completed on 01/[REDACTED]/2013 and 01/[REDACTED]/2013.
14. A psychological evaluation was completed on 05/[REDACTED]/2014.
15. A psychological development profile was completed on 05/[REDACTED]/2014.
16. The Gilliam Autism Rating Scale for behavior was conducted on 05/[REDACTED]/2014.
17. On June [REDACTED], 2014, the IEP team met to conduct an annual review. At this meeting, based on reevaluation results, the team changed Student’s primary eligibility category from Intellectual Disabilities – Moderate (“ID”) to Autism. Student has received special education services under the Autism eligibility category since that time.
18. A functional occupational therapy assessment was conducted on 11/[REDACTED]/2015.
19. A speech/language evaluation was conducted on 12/[REDACTED]/2015, 12/[REDACTED]/2015, and 12/[REDACTED]/2015.
20. An assistive technology evaluation was conducted on 12/[REDACTED]/2015 and 1/[REDACTED]/2016.
21. The IEP Team met on May [REDACTED], 2016, and changed [REDACTED]’s placement from a self-contained Specialized Academic Curriculum (“SAC”) classroom to an Autism (“AU”) classroom.

22. During the 2016-2017 school year, [REDACTED] was enrolled at [REDACTED] [REDACTED] High School, a public school within the Local Educational Agency (“LEA”), as a ninth grader.
23. On December [REDACTED], 2016, the IEP team conducted a reevaluation and annual review to update Student’s current IEP.
24. The Mother disagreed with the IEP team’s decision on June [REDACTED], 2017, to place the Student at the [REDACTED] School.
25. Student attended ESY services at the [REDACTED] School for approximately three weeks in July 2017.
26. Student's current Individualized Education Plan (IEP) was completed on June [REDACTED], 2017, and is effective from August [REDACTED], 2017, until May [REDACTED], 2018. Student's current setting is listed as separate school.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing and the entire record in this proceeding, the Undersigned makes the following findings of fact and conclusions of law. In making the findings of fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to, the demeanor of the witnesses, any interests, bias, or prejudice the witnesses may have, the opportunity of the witnesses to see, hear, know or remember the facts or occurrences about which the witnesses testified, whether the testimony of the witnesses is reasonable, and whether the testimony is consistent with all other believable evidence in the case. From the sworn testimony of the witnesses and the entire record in this proceeding, the undersigned makes the following:

B. Findings of Fact

1. [REDACTED] is friendly, loving, energetic, and always smiling and laughing.
2. At [REDACTED] [REDACTED] High School, [REDACTED] behavior affected her progress on her IEP academic goals. Her behavior interventions were not successful so Respondent reviewed her placement at various IEP meetings during the 2016-17 and 2017-18 school years.
3. Respondent claims that an IEP team focuses on skills and not goals when determining placement and discusses behavior when considering [REDACTED] progress.
4. The multiple IEPs in effect during the period of October [REDACTED], 2016 to October [REDACTED], 2017 failed to address the standard of behavior or to provide any benchmark that [REDACTED] must meet in order for the IEP team to consider a change to a less restrictive environment than public separate school. (R. Exhs. 1, 5, 14, 22, 23 & 27)
5. The IEPs contain behavior-related goals which are measurable, but there is no goal or criteria that is identified as relating to less restrictive environment; there is no measurable standard

that if achieved would result in a change of least restrictive environment or even consideration of a less restrictive environment by the IEP team. (R. Exhs. 1, 5, 14, 22, 23 & 27)

6. At each IEP meeting, [REDACTED] behavior was discussed at length and was the primary focus of discussion. (R. Exhs. 6, 15, 20, 24 28 & 32)

7. Respondent asserts that [REDACTED] behavior was not the reason for the decision to move her to a more restrictive environment, contradicting the Notes for the June [REDACTED], 2017 IEP meeting which record discussion that the ineffectiveness of the Behavior Intervention Plan was a reason for the recommended change of placement. (R. Exh. 5)

8. The Student Portfolio contains data concerning [REDACTED] behavior which was used by the [REDACTED] High School IEP team to justify sending her to [REDACTED] School which is a more restrictive environment.

9. The District's Instructional Coordinating Teachers Team made recommendations concerning behavioral strategies and goals for Student which are in her educational record but were not included in the IEP. These recommendations and strategies were used by the IEP team to make decisions concerning least restrictive environment.

10. The IEP team was divided concerning placement so the LEA made the decision to change [REDACTED] placement to separate school which is a more restrictive environment and assigned her to [REDACTED] School.

11. [REDACTED] behavior and abilities declined after she arrived at [REDACTED] School.

12. There is a specific Student Portfolio Process to exit [REDACTED] School, which Petitioner could have initiated.

13. Respondent never told Petitioner or her advocates that the Student Portfolio Process existed or how to initiate it even though Respondent knew that Petitioner opposed being sent to [REDACTED] School and continued to oppose being at [REDACTED] School.

14. Having given due regard to the demonstrated knowledge and expertise of the Respondent's witnesses with regard to facts and inferences within their specialized knowledge, the Undersigned found the testimony of Jessica Conner, Stephanie Dorton, Amanda McPeters, Caroline Overcash and Paula Williams to be credible and more persuasive than other witnesses on all of the issues before the Undersigned.

15. Petitioner has met her burden of proving by a preponderance of the evidence that Respondent failed to provide a free appropriate public education by failing to place [REDACTED] in the least restrictive environment with an IEP that properly addressed the least restrictive environment.

16. Petitioner did not meet her burden of proving by a preponderance of the evidence that Respondent failed to provide a free appropriate public education during the 2016-17 and 2017-18 school years by failing to develop and implement appropriate behavior interventions; for the 2016-

17 school year by failing to develop appropriate IEPs except as concerns least restrictive environment; for the 2016-17 school year by failing to provide appropriate related services; for the 2016-17 school by failing to allow Petitioner's mother to meaningfully participate in all IEP meetings and predetermining placement on June 1, 2017; and by refusing to provide Petitioner's mother with Independent Educational Evaluations.

DISCUSSION

At the close of the evidentiary hearing and before closing arguments were made, the Undersigned spoke at length on the record of her concerns about least restrictive environment and an IEP that is silent about the standard for measurement or review for continuing to serve Student in a separate school. (Tr. Vol. IX pp. 298-308.) The entire record is silent about what must occur for a change to a less restrictive environment than a separate school. The only response offered by Respondent to the Undersigned's concerns were that Respondent is not required to establish a standard for measurement or review of a decision that separate school is the least restrictive environment for Student; that there is no requirement for establishing periodic reviews or a change in behavior that would trigger review other than the statutorily required annual review of the IEP; and that a change to a less restrictive environment can be initiated at any time. Further, it is Respondent's position that least restrictive environment, including at a separate school, does not require benchmarks or measurability in an IEP. Id.

CONCLUSIONS OF LAW

BASED UPON the foregoing Findings of Fact and the preponderance of the evidence, the Undersigned makes the following Conclusions of Law:

1. The Office of Administrative Hearings has jurisdiction of this contested case pursuant to Sections 150B and 115C of the North Carolina General Statutes and the Individuals with Disabilities Improvement Act, 20 U.S.C. § 1400 et. seq. and implementing regulations (34 C.F.R. Part 300).
2. To the extent that certain portions of the foregoing Findings of Fact constitute mixed issues of law and fact, such Findings of Fact shall be deemed incorporated herein by reference as Conclusions of Law. A court need not make findings as to every fact, which arises from the evidence, and need only find those facts that are material to the settlement of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612, *aff'd*, 335 N.C. 234, 436 S.E.2d 588 (1993).
3. Under IDEA, the burden of proof in an administrative hearing is properly placed on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 51 (2005). In this contested case, Petitioners are the parties seeking relief and therefore bear the burden of proof for the remedies sought. Petitioners have the burden of persuasion in this case to show that Respondent has failed to provide Student with a free appropriate public education ("FAPE") in the least restrictive environment. Petitioners carry that burden by a greater weight or preponderance of the evidence. Black's Law Dictionary defines "preponderance" as "something more than weight; it denotes a superiority of weight, or outweighing."

4. To determine if FAPE has been provided, the Court is to determine if the school has complied with the procedures set forth in the IDEA and if the IEP is reasonably calculated to allow the child to receive educational benefit. *Bd. of Educ. Of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 206-07 (1982).

5. A procedural violation only rises to the level of a denial of FAPE if it results in an IEP that did not provide educational benefit. *M.M. v. Sch. Dist. of Greenville County*, 303 F.3d 523, 533 (4th Cir. 2002).

6. To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

7. “[T]he IDEA rests on two primary premises: that all disabled students receive a FAPE and that each disabled student receive instruction in the ‘least restrictive environment’ (“LRE”) possible.” *AW ex rel. Wilson v. Fairfax Cty. Sch. Bd.*, 372 F.3d 674, 681 (4th Cir. 2004). “The LRE requirement reflects the IDEA's preference that ‘[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled.’” *Id.*; See 20 U.S.C. § 1412(a)(5) (2000); 34 C.F.R. § 300.550(b)(1).

8. “[S]chools must place disabled students in the least restrictive environment to achieve a FAPE. Thus, a disabled child should participate in the same activities as nondisabled children to the ‘maximum extent appropriate.’” *M.S. ex rel. Simchick v. Fairfax Cty. Sch. Bd.*, 553 F.3d 315, 327 (4th Cir. 2009); 20 U.S.C.A. § 1412(a)(5)(A). “[M]ainstreaming of handicapped children into regular school programs ... is not only a laudable goal but is also a requirement of the Act.” *Id.* Mainstreaming is not appropriate for every handicapped and, therefore, the appropriate inquiry concerns its appropriateness for a particular child. *DeVries v. Fairfax Cnty. Sch. Bd.*, 882 F.2d 876, 878 (4th Cir.).

9. The various IEPs for the 2016-17 and 2017-18 school years fail to address the standard of behavior or any requirement or benchmark or measurable criteria that Petitioner must meet in order for the IEP team to consider a change to a lesser restrictive environment than separate school.

10. Petitioners showed by a preponderance of evidence that they had a right to relief under the IDEA.

11. Petitioners showed by a preponderance of evidence that by continuing to keep Student at the separate school as the least restrictive environment with the IEPs as written, deprived Student of a FAPE.

DECISION

The undersigned Administrative Law Judge finds and holds that upon the facts and the law, Petitioners have shown a right to relief in that the IEPs for the 2016-17 and 2017-18 school years fail to address the standard of behavior or any requirement or benchmark or measurable criteria that Petitioner must meet in order for the IEP team to consider either a change to a lesser restrictive environment than separate school to continue separate school as the least restrictive environment.

Therefore, Respondent shall revise Petitioner's IEP to include benchmark(s) and criteria for least restrictive environment that are appropriately designed to meet Petitioner's particular needs before the beginning of the 2018-19 school year.

NOTICE OF APPEAL

In accordance with the Individuals with Disabilities Education Act and North Carolina's Education of Children with Disabilities laws, the parties have appeal rights regarding this Decision.

Under North Carolina's Education of Children with Disabilities laws (N.C.G.S. §§ 115C-106.1 *et seq.*) and particularly N.C.G.S. § 115C-109.9, "any party aggrieved by the findings and decision of a hearing officer under G.S. 115C-109.6 or G.S. 115C-109.8 may **appeal the findings and decision within 30 days after receipt of notice of the decision by filing a written notice of appeal with the person designated by the State Board** under G.S. 115C-107.2(b)(9) to receive notices. The State Board, through the Exceptional Children Division, shall appoint a Review Officer from a pool of review officers approved by the State Board of Education. The Review Officer shall conduct an impartial review of the findings and decision appealed under this section."

Inquiries regarding the State Board's designee, further notices and/or additional time lines should be directed to the Exceptional Children Division of the North Carolina Department of Public Instruction, Raleigh, North Carolina prior to the required close of the appeal filing period.

IT IS SO ORDERED on the 8th day of June, 2018.



Selina Malherbe
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

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This the 8th day of June, 2018.



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