STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

ADMINISTRATIVE
IMPARTIAL
DUE PROCESS HEARING

CASE LL 14-22

[redacted]

v.

CUMBERLAND SCHOOL DISTRICT

DECISION

HELD: Petitioner claimed district denied placed student in an unnecessarily restrictive environment and ignored reasonable alternatives, crafted an IEP that denied FAPE, failed to adopt consultant recommendations, and committed procedural violations that inhibited parents ability to participate in IEP process.

Hearing officer found that school appropriately crafted IEP that provided FAPE and did not ignore consultant recommendations. School did commit procedural violation that inhibited petitioner's ability to participate in IEP process.

LEXICON

In order to ensure confidentiality and to enhance readability, the following Lexicon is provided. Note that the exhibit numbers are not in numerical order and reflect the number the petitioner attached in their pre hearing evidence submission.

Identifying information	Abbreviation
Student: [redacted]	J.M.
Petitioners: [redacted]	
Defendant LEA: Cumberland School District	
Individuals with Disabilities Education Act. 20 U.S.C. 1400 et seq.	IDEA or the Act
Rhode Island Special Education Regulations	Regulation or the regulations
"A free and appropriate education" as defined by IDEA and case law	FAPE

Full Exhibits	
19	IEP for J.M. from December 2013 to December 2014 (the "December IEP")
18	IEP for J.M. from July 2014 to August 2014 for extended year services (the "ESY IEP")
8	Meeting notice dated April 17, 2014
14	IEP for J.M. from August 2014 to December 2014 (the "Proposed IEP")
25	IEP Meeting notes dated April 14, 2014
26	IEP Meeting notes from IEP Meeting on April 30, 2014
27	IEP Meeting notes from IEP dated June 2, 2014
28	Email exchange between Fred Schockaert and the petitioners

29	Letter from Cumberland Schools to Petitioners Dated August 26, 2014
22	J.M. Math work entitled "My module 7 application problems"
3	Progress report from University of Rhode Island ("URI") Speech and Hearing Center dated May 8, 2014
4	Progress report from University of Rhode Island ("URI") Speech and Hearing Center dated August 1, 2014
13	August 2014 letter from Cumberland Schools to petitioners
11	Letter from Dr. Hirsch to Anne Gorman dated January 15, 2014
12	Educational Assessment by Delta Consultants dated May 8, 2013
16	Progress Report for J.M. for the 2013-2014 school year
30	IEP meeting notice dated September 11, 2014
17	2013-2014 ESY IEP program reports
31	Progress report from University of Rhode Island ("URI") Speech and Hearing Center dated May 8, 2014 with stamp indicating it was received by the district on June 14, 2014
24	March 2014 IEP progress report for J.M.

List of Testifying Witnesses	
Name	**Role**
[redacted]	Parent
[redacted]	Parent
Mary Ellen Rossi	Special Educator for LEA and J.M.'s case manager
Kristen Costa	Special Educator for LEA and the a classroom teacher for the intense academic environment
Julie Dean	Regular Educator for LEA and J.M.'s general educator for the 2013-2014 school year
Fred Schockaert	Former Deputy Dir. Of Special Ed for LEA
Dr. Lisa Beaudoin-Colwell	Director of Special Education for LEA
Dr. Dana Osoweicki	Psychologist, LEA consultant

Geraldine Theadore	Clinical Associate Professor at URI Dept. of Communication Disorders, petitioner consultant
Dr. Bennett Z. Hirsch	Psychologist, petitioner consultant

TRAVEL OF CASE

The undisputed facts in this case are that J.M. is an eight year old student in the Cumberland School District. He is a disabled child within the meaning of the Act and has had an IEP. He has childhood apraxia and has suffered delays because of his apraxia. During the 2013-2014 school year J.M. was in second grade and was covered by an IEP during the first semester of the school year. In December 2013 the IEP developed a new IEP to cover J.M. until December 2014. This IEP is not in dispute.

From September 2013 until approximately the beginning of May 2014, J.M. was in a regular education classroom. In April 2014 two IEP team meetings were convened. One was ostensibly to set up extended year services that would allow J.M. to attend summer school. The other was convened to address J.M.'s ongoing educational difficulties. In May of 2014, J.M. was placed in a smaller classroom setting with a small number of children on a trial basis.

A third IEP team meeting was convened in June of 2014 and a proposed IEP was developed that placed J.M. in the smaller setting as part of his educational plan. J.M.'s parents filed this due process complaint on June 17, 2014 alleging several procedural violations and substantive violations around the placement of J.M. in the smaller classroom and the alleged refusal to accept the recommendations of certain consultants who were assisting J.M.'s parents with J.M.'s educational and emotional health.

A series of pre hearing meetings were convened. The parties jointly moved to extend the 45 day deadline for a decision to November 30, 2014. A hearing was held on September 16, 2014 and continued for several days afterward.

During the hearing several witnesses testified and a number of exhibits were placed in the record. The petitioner called J.M.'s parents who testified to general details about J.M. and described their experience with J.M. and the IEP process throughout the 2013-2014 school year. The petitioner next called Mary Ellen Rossi, J.M.'s special educator and case manager. Ms. Rossi testified regarding J.M.'s educational history in the 2013-2014 school year. Petitioner also called Kristin Costa, J.M.'s teacher in the small classroom setting and Julie Dean, J.M.'s regular educator. Both testified as to J.M.'s educational history in the 2013-2014 school year.

The petitioner then called several school non-teacher witnesses. The petitioner called Fred Shockaert who primarily testified about the alleged denial of access to the small classroom for observation by J.M.'s parents. The petitioner called Dr. Lisa Beaudoin-Colwell, the director of special education at Cumberland. Dr. Beudoin-Colwell was questioned about several topics all centering around alleged infirmities in the provision of special education to J.M. The petitioner also called Dr. Dana Osoweicki, a consulting psychologist for the school. She testified about her efforts to assist the IEP team in developing a response to J.M.'s anxiety based behaviors.

Finally the petitioner called two consultants: Geraldine Theadore and Dr. Bennett Hirsch. Ms. Theadore and her organization tutors J.M. in reading and she is an expert in the Orton Gillingham method of reading instruction. She testified about her work with J.M. and his reading ability. Dr. Hirsch testified about J.M.'s anxiety problems.

The petitioner rested and the school recalled Mary Ellen Rossi and Dr. Beaudoin-Colwell, in its case in chief. Further facts will be detailed as necessary in the decision.

After full consideration of the issues, a review of testimony and weighing the credibility of the witness, and review of the exhibits, I find that the petitioner has sustained their burden on the claim regarding denial of access to smaller classroom setting for observation. All other claims are denied.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. PETITIONER'S ALLEGATION THAT THAT THE PROPOSED IEP PROVIDES FOR A PLACEMENT THAT IS NOT THE LEAST RESTRICTIVE ENVIRONMENT AS DEFINED BY RHODE ISLAND REGULATION 300.114

The Petitioner has alleged that the proposed IEP (Exh. 14) provides for an educational placement for J.M. that is more restrictive than necessary to provide FAPE. In particular, the petitioner alleges that the proposed IEP would place JM in a "special class integrated in a school district building" (Exh. 14 at 16) and that placement is more restrictive than the placement outlined in the December 2013 IEP (Exh. 19 at 16). The petitioner alleges that this change was made without the parent's consent or input and is not the least restrictive environment in which J.M. can receive the services outlined in the proposed IEP.[1]

IDEA mandates that when educational services are delivered to students, the services must be delivered in the least restrictive environment 20 U.S.C. 1412(a)(5), RI Spec. Ed. Regs. 300.114. Accordingly, students covered by the Act must be educated to the maximum extent possible with non-disabled students. Id. Any services delivered outside the regular educational environment can only occur if the "nature or severity of the disability is such that education in

[1] The petitioner's claim that the placement occurred without their consent is addressed part IV.

regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." Id. Thus the question is, does the proposed IEP unnecessarily restrict the delivery of services to an environment that is outside the general education environment?

Under the December 2013 IEP (Exh. 19) J.M. was educated inside a regular education class more than 80% of the time. Exh. 19 at 15. The IEP further described which services were to be given in the regular education classroom and which ones were to be given in another environment (in a location designated as "other"). Exh. 19 12-15. Ms. Rossi described the "other" environment as "specialized instruction in class for reading, math and writing support" in the regular education class room. Tran. September 16, 2014 at pg. 168. Ms. Rossi also indicated that J.M. had a "pullout" for individual instruction with Ms. Rossi alone in a resource classroom. Id. at pg. 169. Thus, J.M. was instructed under the December 2013 IEP in a regular education classroom with individual, one-on-one instruction in reading in another classroom with no other children present.

In contrast, the proposed IEP still provides for instruction in a regular education classroom more than 80% of the time.[2] Exh. 14 at 15. However, services designated to be delivered in the "other" location were to be delivered a "special class integrated in a school district building." Id. at 12-16. The remainder of the proposed IEP is identical to the December 2013 IEP.

There can be no doubt that the educational environment in the proposed IEP is, in fact, more restrictive than the educational environment described in the December IEP.[3] The proposed IEP

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[2] Ms. Rossi testifies that the actual breakdown of time between the intense academic environment and the regular education classroom would be 27% intense academic time and 73% general education time. Tran Sept. 16, 2014 at 198.

[3] Fred Schockaert testified that he considered a small group classroom was in fact less restrictive than one on one instruction. Tran. Sept. 17, 2014 at 319. Ms. Costa held the same opinion. Tran. Sept. 22, 2014 at 29. In this case, the comparison to be made is, on the one hand, the amount of time spent for education delivered primarily in a regular education classroom with a "pullout" for one subject and, on the other, the amount of time for instruction in *all* of JM's areas of specialized instruction in a non-regular education classroom. The testimony of Mr. Schockaert

specifies eight discrete services to be given in the smaller classroom while the December 2013 IEP describe six services to be given at the "other" location. Also, according to Ms. Rossi's testimony, almost all of the services in the December 2013 IEP were actually given in the regular education classroom, albeit in some specialized manner. The only service that was given to JM outside of the regular education classroom was for reading on a one-to-one basis.

The evidence also shows that the IEP team's decision to deliver services in the more restrictive environment is proper. The IEP team met on June 2, 2014 and developed the proposed IEP. The meeting notes from that meeting clearly show that the team felt that JM would make better progress towards the goals of the IEP in the smaller setting. Exh. 27. The team based this conclusion of the results of JM's Rigby reading scores after the trial period in the smaller class and the rate of increase in that score as compared to the rate of increase JM displayed during the rest of the 2013-2014 school year. Id. Ms. Rossi also confirmed that the consensus of the IEP team was to place JM in the smaller classroom for his specialized instruction because of the success of the trial period. Tran. Sept. 16, 2014 Vol. 1 at pg. 197.

The petitioners argue that they had suggested a clear alternative to this more restrictive environment. They argue that the recommendations of Ms. Theadore would allow J.M. to access the curriculum in a less restrictive environment. However, the evidence shows that the IEP team was not in possession of Ms. Theadore's suggestions as further detailed in section III.

Accordingly, the petitioner has failed to show by a preponderance of evidence that the change in placement to a more restrictive environment is improper.

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and Ms. Costa do not address the temporal issue and how it would affect their analysis of the restrictiveness of the placement. Thus their testimony is not persuasive on this point.

II. PETITIONER'S ALLEGATION THAT THE PROPOSED IEP FAILS TO PROVIDE A FREE AND APPROPRIATE EDUCATION

The petitioner has alleged that the proposed IEP fails to provide a free and appropriate education. The petitioner argues that the proposed IEP is calculated to deliver only *de minimis* educational benefit. In addition, the petitioner argues that the proposed IEP does nothing to accommodate educational obstacles presented by J.M.'s anxiety disorder.

The Individuals with Disabilities Education Act ("IDEA" or the "Act"), 20 U.S.C. 1400 *et seq.* governs the education of children with disabilities by public schools that receive federal money to educate those students. The Act specifies that children with disabilities that require special education must be educated in accordance with an individual education plan ("IEP"). 20 U.S.C. 1414; R.I. Spec. Edu. Regs 300.320. That is, a plan that is unique to the student and developed by an IEP team, the membership of which is controlled by statute and regulation. 20 U.S.C. 1414; R.I. Sped. Edu. Regs. 300.321. The IEP must be reasonably calculated to confer some educational benefit on the student and allow them to access the general curriculum. James S. v. Town of Lincoln, 59 IDELR 191 (D.R.I. 2012) citing Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176, 203 (1982) The IEP need not be designed to maximize the educational benefit a student may receive; only that the educational benefit be meaningful. Id. Further, an IEP must take into account the whole student and be designed to address those unique qualities in the student that present an obstacle to accessing the curriculum. Lenn v. Portland School Committee, 998 F.2d 1083, 1086 (1st Cir. 1993).

a. Allegation that the proposed IEP is calculated only to provide *de minimis* educational benefit

The evidence presented at the hearing in the form of testimony and exhibits clearly shows that J.M. experienced a meaningful educational benefit while he was educated under the December 2013 IEP. Because the proposed IEP is nearly identical to the December IEP (except for the location of services as previously described), the potential efficacy of the proposed IEP can be reasonably ascertained from the progress or lack of progress made under the December IEP.

J.M.'s progress under the December IEP was indeed slow but there was progress. The parties presented evidence on the progress issue in the form of testimony, student progress monitoring reports, and examples of J.M.'s work.

J.M.'s case manager, Mary Ellen Rossi, testified in this matter. She testified that she had worked for nearly ten years in the Cumberland School District as a special education teacher. Tran. September 16, 2014 at page 166. And that she had worked with J.M. since September 2012. Id. at 167. On the issue of J.M.'s progress under the December IEP, she testified that J.M. had made reading progress as measured by his scores on the "Rigby" scale.[4] J.M.'s scores on the Rigby scale improved slightly during the beginning part of the school year but Ms. Rossi attributed that slow progress to the fact that J.M. had maximized his ability to progress with the methodology she was using. Mr. Rossi testified that a decision was made to try a new methodology with J.M. (administered in the small, non-regular education classroom) and his scores improved at a much greater pace. Kristen Costa, the special educator who taught in the small group setting and delivered services to J.M. during the trial period, testified that his reading

[4] Both parties accepted the use of the Rigby system as a valid measurement tool. Petitioner did not present any evidence that the system was not a sound method for measuring reading progress.

progress in the small group was significant. Tran. Sept. 22, 2014 at 26. She stated, "He's responding to the program." Id.

J.M.'s mother, [redacted], testified and gave her opinion about the rate of J.M.'s progress. She testified that J.M. progress during the entire year was unsatisfactory and she frankly did not agree with the conclusions of the educators. Tran Sept. 16, 2014 at 112. However, the defendant established that Ms. [redacted] had no special training in the area of special education. Tran Sept. 16, 2014 at 120. There was no evidence that she conducted her own formal examinations of J.M. to determine his true reading ability. Ms [redacted] opinion was based on her own personal experience with her son and appeared to this writer as a "gut feeling" about her son's progress.

Despite Ms. [redacted] testimony, the testimony of the special educators and the exhibits showing progress through the 2013-2014 school year under the December IEP indeed do show progress. Because the proposed IEP is based on the December IEP, it is reasonable to conclude that the proposed IEP is calculated to provide meaningful educational benefit. This is especially true when the one difference between the December IEP and the proposed IEP is the location of service and the change in location appears to be a factor that greatly contributed to J.M's accelerated rate of progress in the final months of 2014.

b. Allegation that the school district has failed to accommodate obstacles to J.M.'s ability to access FAPE as a result of his anxiety disorder

Evidence was presented through Dr. Hirsch that J.M. has an anxiety disorder. At some point in 2013, J.M.'s general classroom teacher noticed that J.M. displayed some behaviors that she believed were due to some anxiety. Tran Sept. 22, 2014 at 78. Notably, J.M. chewed on his shirt to the point of chewing a hole in the fabric. Id. In addition, school officials were

on notice from Dr. Hirsch that J.M. had an anxiety diagnosis. Exh. 11. Dr. Hirsch provided that information in the form of a letter addressed to the school psychologist, Ann Gorman, in January 2014. In the letter, Dr. Hirsch recommended weekly counseling for J.M. Id.

After noticing the issue, Ms. Dean suggested to Ms. Rossi that J.M. might need more support around his anxiety. Tran Sept. 22, 2014 at 80. Ms. Dean then addressed the problem through the use of "check in, check out" procedure and other minor supports in the short term. Tran Sept. 22, 2014 at 79; Tran Sept. 17, 2014 at 279. The check in and check out procedure was a structured method for ensuring J.M. made contact with adults and checked his progress throughout the day. Tran Sept. 17, 2014 at 283. Ms. Dean testified that she engaged the use of a "Target Team" composed of other education and mental health professionals to analyze J.M.'s anxiety based education problems. Id. Presumably, the educators believed that this and other supports would alleviate some of J.M. anxiety based education barriers. Overall, Ms. Rossi testified that she was aware of the issue and taking steps to deal with it from the end of 2013 through the end of the school year in May 2014.

Finally, in June of 2014 the IEP team met, discussed the issue, and contemplated ways to accommodate the issue. Tran. Sept. 19, 2014 at 22. The team consulted with Dr. Dana Osoweicki who gave some suggestions to the team about how to address the issue. Id. Dr. Hirsch testified that the supports put in place in the proposed IEP were "a start". Tran. Sept. 22, 2014 at 64.

Thus is appears that the school officials were on notice of a possible problem with J.M.'s anxiety for the majority of the 2013-2014 school year and took steps outside the IEP process to address the problem. The evidence shows that the IEP team at least discussed the issue in

June of 2014. Further, both the December 2013 IEP and proposed IEP identify anxiety as an issue for J.M. Exh 19 and 14 at 4, "Needs" section, ¶ 1.

The Act and associated regulations require that the IEP team craft an IEP that addresses the unique needs of the child. Clearly, in this case, J.M.'s anxiety should be addressed by the IEP team. Petitioner argues that not enough was done in the 2013 – 2014 school year to address the anxiety issue and thus the failure to act, or act appropriately, constituted a denial of FAPE. The evidence does not support this conclusion.

The Act only requires that an IEP team craft an appropriate IEP. The Act does not dictate how IEP teams should address the myriad of unique issues attached to each individual student. Thus, had the IEP team simply ignored the anxiety issue despite having notice of it, then the petitioner would prevail on the claim. However, the evidence shows that the IEP team certainly did discuss the issue and consulted with an expert to help the team come up with some set of solutions to address the problem. The proposed IEP (and the December 2013 IEP) acknowledges that anxiety is an issue for J.M. and it impedes his ability to access FAPE. Based on the evidence presented, I cannot conclude that the IEP team ignored the issue. Certainly, the IEP team response to the issue could have been, and perhaps should have been, more aggressive but the hearing process is not designed to substitute the hearing officer's judgment for the judgment of the IEP team. Only to determine if the IEP acted in accordance with the law. Although it is a very close call, because the IEP team addressed the issue and incorporated some remedies in the proposed IEP, the petitioner's claim on this point is denied.

III. PETITIONER'S ALLEGATION THAT THE SCHOOL DISTRICT HAS FAILED TO ADOPT THE RECCOMENDATIONS OF THE PETITIONER'S CONSULTANTS

The petitioner presented testimony from two consultants who had worked with J.M. and alleged that school officials failed to adopt the recommendations of the consultants at the June 2, 2014 IEP team meeting. In particular, the petitioner claims that the school unreasonably refused to accept the recommendations of Geraldine Theadore.[5]

The initial inquiry into this claim must focus on when, if ever, the school officials came into possession of the recommendations. Obviously if the school recived the document containing the recommendations after the June 2, 2014 IEP team meeting then the petitioner's claim must fail because the record reflects that meeting was the last meeting before the due process complaint was filed.

Several witnesses testified on this issue. Ms. [redacted] testified that she gave the URI progress report (Exh. 3), which contained the recommendations of Ms. Theadore and her staff, to the school at some point after May 8, 2014. Tran. Sept. 16, 2014 at 80. However, she was unable to identify when she gave the school the document. Id. Ms. Rossi testified that the URI report was not made available to the team prior to or during the June 2, 2014 IEP meeting. Tran. Sept. 17, 2014 at 274. Finally, Exh. 31 is a copy of the URI report with a stamp indicating it was received by the school district on June 14, 2014.

Therefore, the evidence does not show by a preponderence that the school district did not possess the recommendations of Ms. Theodore prior to the IEP team meeting that produced the proposed IEP. Thus, the petitioner's claim that the IEP team ignored or unreasonably failed to adopt the recommendations contained in the URI progress report is denied.

[5] Allegations that the school did not implement Dr. Hirsch's recommendation is addressed in section II(b).

IV. PETITIONER'S ALLEGATION OF PROCEDURAL VIOLATIONS THAT HAVE SUBSTANTIVELY INHIBITED J.M.'S ACCESS TO A FREE AND APPROPRIATE EDUCATION

The petitioner alleges that the school district has committed procedural violations of the regulations that have worked to create a substantive violation of the Act and its regulations. Section 300.513 specifies that a hearing officer may only base a finding of a denial of FAPE on substantive grounds. Procedural violations cannot support a finding of a denial of FAPE unless the violations "impeded the child's right to a FAPE", "[s]ignificantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child", or "[c]aused a deprivation of educational benefit". Id.

In this case, the petitioner substantively presented and argued four alleged procedural violations that resulted in a substantive violation. These arguments are addressed *infra*.

a. Petitioner's allegation that the school district inappropriately denied access to the location of the proposed educational placement for purposes of evaluating the placement.

In April 2014, an IEP team meeting was held in which the team decided to place J.M. on a trial basis in a small classroom setting for the delivery of his specialized education. Exh. 26. The Petitioner's argue that they never agreed to even a trial placement and were denied an opportunity view the educational environment while it was in operation. The school suggests that the petitioner's did in fact give their permission for J.M. to be placed in the smaller classroom but confirms that they did in fact deny the petitioner's unfettered access to the environment.[6]

[6] During the hearing, there was significant back and forth between the sides about the exact nature of the smaller classroom. The petitioner argued mightily that the classroom was a so-called "self-contained" classroom. Ms. Rossi, J.M.'s special educator, testified that a self-contained classroom was defined as an all-day classroom. Ms. Rossi further testified that Cumberland had an "intense academic program" that existed in a classroom with a limited

Regulation 300.116 specifies a number of requirements for the placement of children with IEP's. Included in the regulation is a requirement that the placement be determined by the IEP team including the parents. Reg. 300.116(a)(1). Further, the entirety of the regulations as they relate to the creation of an IEP by an IEP team envision that the parents are fully integrated members of the IEP team. See generally, Reg. 300.320 – 300.328; See also, 300.501. It follows then that the parents must have access to reliable information about the proposed placement if they are to make a meaningful and informed decision in this regard. They must also have access to information that is readily available to other members of the team.

In this case, the IEP team suggested that the team move J.M. to the intense academic environment to see if that resulted in any improvement in his performance.[7] Mr. and Mrs. [redacted] then requested access to the intense academic program in an email to Fred Schockaert Exh. 28. Mr. Schockaert responded via email and stated that "for confidentiality reasons" he could not grant access. Id. Mr. Schockaert did not elaborate in his email or his testimony what exactly his confidentiality reasons were. Id.

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number of students; approximately 4-5 children. Ms. Rossi further testified that the children in the "intense academic program" were placed there for only part of the school day and only to receive specialized education. Additionally, Mr. Schockaert, the Deputy Director of Special Education, testified that Cumberland did not have self-contained classrooms.

Ms. Rossi indicated that the team proposed that J.M. try out the intense academic program on a trial basis and that he would only be in the classroom to receive specialized instruction. Then he would rejoin his regular class in a regular education classroom. Based on the evidence, I find that the district did not place J.M. in a self-contained classroom or propose that he be placed in one because the school does not have a self-contained classroom as defined by the witnesses. Further, there was never any testimony from any witness that J.M. was to be removed from the general classroom permanently and be placed in a small group classroom for the entire school day

[7] Whether or not Mr. and Mrs. [redacted] gave permission for the trial placement was the subject of some dispute at the hearing. Ms. Rossi indicated that she had a telephone conversation with Mr. [redacted] and he gave his approval for the trial placement. Tran. Sept. 16, 2014 at 181. Mr [redacted] testified that he did not remember having that conversation and that both he and his wife did not want J.M. to be placed in a self-contained classroom. However, Ms. Rossi's demeanor was credible and I credit her testimony that she did in fact get approval from Mr. [redacted] for the trial placement. Of course, the parents ultimately objected to the permanent placement in the intense academic setting by filing the due process complaint.

The petitioners were afforded other kinds of access to the environment. Tran. Sept. 16, 2014 at 72. Mrs. [redacted] was offered the opportunity to see the classroom after hours. Id. She also spoke with the classroom teacher for the intense academic program, Kristin Costa, about the environment. Tran. Sept. 22, 2014 at 30.

The defendant's denial of access to the classroom for even a brief visit during classroom hours constitutes a procedural violation because the denial inhibited the petitioner's ability to be fully informed members of the IEP team. While other members of the IEP team clearly had access to the classroom during operational hours (e.g. Kristen Costa and Mary Ellen Rossi), the petitioners were told they could not have access to the information that an observation period would have provided including the opportunity to see firsthand the relative restrictiveness of the placement. The change from a general classroom setting with the occasional pull out for one-on-one tutoring to a placement in a small group setting approximately 20% of every school day is a significant change in placement. Thus the denial of the parent's ability to see the new educational environment is a procedural violation that significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to J.M.

The defendant correctly points out in its brief that a mere change in location of services is not the same as a change in educational placement. See Final Brief of the Defendant at 31 (citing Lunceford v. District of Columbia Bd. of Educ., 745 F.2d 1577 (D.C. Cir. 1984) and other cases for the proposition). However, Lunceford also states:

> "The leading precedent on what type of change constitutes a change in educational placement is Concerned Parents v. New York City Board of Education, 629 F.2d 751 (2d Cir.1980), cert. denied, 449 U.S. 1078, 101 S.Ct. 858, 66 L.Ed.2d 801 (1981). The Second Circuit stated in Concerned Parents that a change in educational placement occurs only when there is a change in the "general educational program in which a child ... is enrolled, rather than mere variations in the program itself." Id. at 754. Under Concerned Parents, a move from a "mainstream" program to one consisting only of handicapped students

> would constitute a change in educational placement; a move from one mainstream program to another, with the elimination of a theater arts class, would not be such a change." Lunceford, 745 F.2d at 1582.

If this were the case of merely one of moving the location of services with no other changes, or minimal changes, in J.M.'s educational program then the defendant would prevail on this issue. However, in this case, the move of educational services from a general classroom setting with one-on-one support to the intense academic classroom with much fewer students is one that not only changes location, but is a change in the restrictive nature of the placement. Thus the move is in fact, a change of placement in addition to a change in location and the parent is entitled to participate decision to change the placement.

The defendant also points out that there is no general or specific right in the Act to view the proposed educational environment of a disabled child. See Final Brief of Defendant at 32 (citing TG ex rel. RP v. New York City Dept. of Educ., 973 F. Supp. 2d 320 (S.D.N.Y. 2013); Hanson ex rel. Hanson v. Smith, 212 F. Supp. 2d 474 (D. Md. 2002).) Again, the defendant is correct; there is not specific right in the Act to view a proposed educational placement or learning environment. However, there are any number of transactions and interactions on any given day between parents of disabled children and school authorities that are not specifically delineated in the Act but easily come under can be construed as ensuring parental participation in the process of creating, reviewing, and revising the IEP. Thus the mere assertion that the right is not specifically provided for in the Act is not persuasive.

Finally, the defendant also cites to OSEP letter to Shari Mamas ("Mamas Letter"), May 26, 2004 for the proposition that the school district acted properly. However, when the relevant section of the letter is read in its entirety, the letter actually negates the defendant's argument. The Mamas Letter states:

> While the IDEA expects parents of children with disabilities to have an expanded role in the evaluation and educational placement of their children and be participants, along with school personnel, in developing, reviewing, and revising the IEPs for their children, neither the statute nor the regulations implementing the IDEA provide a general entitlement for parents of children with disabilities, or their professional representatives, to observe their children in any current classroom or proposed educational placement. The determination of who has access to classrooms may be addressed by State and/or local policy. *However, we encourage school district personnel and parents to work together in ways that meet the needs of both the parents and the school, including providing opportunities for parents to observe their children's classrooms and proposed placement options*. In addition, there may be circumstances in which access may need to be provided. For example, if parents invoke their right to an independent educational evaluation of their child, and the evaluation requires observing the child in the educational placement, the evaluator may need to be provided access to the placement. (emphasis added)

Thus, while there is no general right to viewing the environment in the statute, the direction from OSEP is clearly to allow such viewing if at all possible.

Here, the assertion of "confidentiality reasons" by Mr. Schockaert, without more, is simply not a good enough reason to deny the petitioner's request. The asserted reasoning contains almost no illuminating information. The defendant did not present any evidence to support or otherwise explain Mr. Schockaert's decision. Thus, the answer invites the hearing officer to assume that the school had a good reason to deny a reasonable request of participation. There may well be good and appropriate reasons for limiting access in this manner, but those reasons are not present on the record.

Thus, the denial of the parent's ability to participate in the process by having access to the classroom in the same manner as other member of the IEP team "[s]ignificantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child." The petitioners have sustained their burden on this claim.

b. Alleged improper implementation of Extended Year Services ("ESY")

The petitioner has alleged that ESY services were improperly delivered in that the delivery of ESY services did not deliver all the services outlined in J.M.'s December IEP.

The delivery of ESY services is controlled by Regulation 300.106. However, Regulation 300.106 references the RI Department of Education Extended School Year Standard (the "ESY Standard"). The ESY Standard essentially directs schools to comply with IDEA during the summer season by analyzing those skills and areas of educational need where regression might occur during the summer break and take steps to prevent that regression. Id. The standard clearly states that provides that ESY instruction should be focused "on those specific IEP goals and objectives severely impacted by extended breaks in instruction." ESY standard at I(c). Thus, schools are not required to replicate every aspect of IEP instruction during the summer months. Petitioner's arguments to the contrary are therefore meritless.

Additionally, the evidence shows that the school district undertook the proper steps to comply with the regulations and the ESY standard. Ms. Rossi testified that the team engaged in analysis to determine what services J.M. would be provided in the summer. Tran. Sept. 16, 2014 at 173. Ms. Rossi testified that he met the regression standard for some areas and not for others; particularly occupational therapy and speech. Id. As such, a summer ESY IEP was developed and implemented to address areas where regression was a possibility based on J.M.'s historical data. Id.

The petitioner put forth no evidence to support the argument that ESY was improperly handled. Instead the petitioner argued that the approach taken by the school was not in accordance with the regulations and the Act. As discussed *supra* the school complied with all

relevant state regulations. Because petitioner has not identified an area of the Act that is contrary to the state ESY regulations, the petitioner's claim on this issue is denied.

c. Petitioner's allegation that the school district did not supply J.M. with an "annual IEP"

The petitioner claims that the school did not provide J.M. with an annual IEP. The evidence shows that the IEP team developed three IEP's between December 2013 and June 2014. The team developed the December 2013 IEP and then followed it up with an IEP meant to cover ESY services in the summer between the 2013-2014 and 2014-2015 school year. Finally the team developed the proposed IEP that was designed to cover the first semester of the 2014-2015 school year.

Petitioner claims that these successive IEP's violate the requirement that the school develop and review IEP's on an annual basis. The controlling regulation, Reg. 300.324(b)(1)(i) specifies that IEP's must at least be reviewed annually, but there is no regulation that prohibits the school reviewing the IEP more frequently which is what happened in this case.[8]

d. The Petitioner's allegation that the school district has not acted in good faith and changed J.M's proposed educational placement when Petitioner filed their due process complaint

Finally, the petitioner claims that the school engaged in bait and switch style of behavior arguing that the school intended to put J.M. in a self-contained (as defined in footnote 5) classroom and then changed the plan to a less restrictive environment once due process claim was filed.

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[8] Petitioner ties their annual IEP argument to a claim that all the IEP changes and associated communication to the parent from the school somehow confused the parents and thus constituted a procedural violation of some kind. The Act only requires that the parents be allowed to fully participate in the special education process. It is still the responsibility of the IEP team and the LEA to educate the child. In this case the school actively managed J.M.'s case and there were substantial changes in a short period of time. The pace of IEP revision is entirely in the discretion of the IEP team and the parent cannot base a cause of action on the pace of change alone as long as they are fully informed, consistent with the regulations, along the way.

The primary evidence supporting the allegation is a notice sent by the school in August 2014 informing the petitioners that J.M.'s main classroom for the 2014-2015 was a special education classroom. Exh. 13. Petitioner's claim that the school then clearly reversed course and sent a new notice on or about August 26, 2014 directing J.M. to a regular education class. Exh. 29.

All the school's witnesses who testified on the matter indicated that first letter was a simple, albeit unfortunate, clerical error. I credit the testimony of the school officials in this regard and find that the evidence of the letter does not support the presence of a plan of deceive the petitioners or somehow cover up unlawful behavior on the part of the LEA.

CONCLUSION

In accordance with the facts and reasoning outlined *supra* I find that the petitioner's claim with respect to the denial of access to the intense academic classroom is supported by a preponderance of evidence. All the petitioner's other claims are denied. The petitioner has requested prevailing party status. I will address prevailing party status in a separate opinion.

Signed,

Jason Knight
Independent Hearing Officer

Date: November 30, 2014