NEW MEXICO PUBLIC EDUCATION DEPARTMENT

PROCEEDINGS BEFORE THE DUE PROCESS HEARING OFFICER

PARENTS,
on behalf of Student, a minor,

Petitioners

v.

PECOS INDEPENDENT SCHOOLS,

Respondent DPH # 0910-13

DECISION OF THE DUE PROCESS HEARING OFFICER

Muriel McClelland, Esq.
Due Process Hearing Officer

February 4, 2010

Attorney for Petitioners (Grandparents):

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not include personally identifiable information, may be released.

DUE PROCESS HEARING
DPH 0910-13

DECISION

The matter coming before the due process hearing officer (DPHO) at a hearing held on January 12-13, 2010; Petitioners (Grandparents) represented by Jason Gordon and Flynn Sylvest, Attorneys at Law; Respondent (District) represented by Jacquelyn Archuleta-Staehlin and Elizabeth Church, Attorneys at Law, and the hearing officer, having heard the testimony of witnesses, having reviewed the exhibits, and being otherwise advised in the premises, enters the following findings of fact, conclusions of law and Order.

STATEMENT OF PROCEDURE

Parents filed a request for due process with the New Mexico Public Education Department (NMPED) on October 27, 2009, alleging their private placement was appropriate while District's placement was not. *[DPHO Exhibit 1]* This hearing officer was appointed on October 28, 2009. *[DPHO Exhibit 2]*.

At the pre-hearing telephone conference held on November 6, 2009, the hearing officer scheduled the due process hearing for December 7-8, 2009, to accommodate attorney and hearing officer schedules. Extensions requested by the parties were granted for good cause shown. *[DPHO Exhibit 7]* Petitioners' Motion for Stay-Put and District's Motion for Summary Judgment were heard on November 6, 2009, as well. *[DPHO Exhibits 5, 6]* Both Motions were denied.

[DPHO Exhibit 8] Statements of issues were submitted on November 19, 2009. *[DPHO Exhibits 9, 10]*

District's Motion to Reschedule Due Process Hearing was heard on December 3, 2009 *[DPHO Exhibit 11]* The extension was granted for good cause shown and the hearing rescheduled for January 12-13, 2010. *[DPHO Exhibit 12]* Exhibits and witness lists were exchanged on January 4, 2010. *[DPHO Exhibits 13, 14, 15, 16, 17]* District's Motion in Limine (filed on January 7, 2010 and opposed by Petitioners) was heard preliminary to the hearing on January 12, 2010 *[DPHO Exhibits 18, 19]* Prior to hearing testimony, District's renewed Motion for Summary Judgment (based upon Petitioners declining services on a Prior Written Notice), and District's renewed Motion to Dismiss (based upon *res judicata* and claim preclusion), were both denied. District's oral Motion to Dismiss following presentment of Petitioners' case-in-chief was also denied. The parties did not agree to submit joint exhibits. Briefs and requested findings of fact and conclusions of law were timely filed. *[DPHO Exhibits 21, 22, 23]* This decision was entered on February 8, 2010.*[DPHO Exhibit 24]*

ISSUES PRESENTED

Petitioners have identified the following issues for determination by the hearing officer:

1. Whether the IEP proposed by the Respondent on September 18, 2009 provides Student with FAPE?

2. Whether the IEP of September 18, 2009 provides Student with direct, specialized services she requires?

3. Whether District considered the independent evaluations and teacher input available to the

IEP appropriately and in good faith and whether District provided any supportable basis for the change in Student's placement?

4. Whether Grandparents were denied an opportunity for meaningful parental participation at the IEP meeting?

5. Whether the reasons for the change in placement advanced by District were supported by the evidence and teacher input available to the IEP team and adequately documented in the prior written notice (PWN)?

6. Whether the IEP at issue is adequate to provide and maintain the assistive technology (AT) that Student needs to obtain benefit from her educational program?

7. Whether District has the capacity to provide the specialized educational setting that Student requires?

8. Any other issues raised by grandparents in their request for due process hearing incorporated herein by reference.

Respondent submits the following Statement of Issues:

1. All issues identified in District's Answer and Counterclaim concerning the parties' mediated agreement.

2. All issues identified in District's Motion for Summary Judgment.

3. Whether, by signing the mediated agreement, grandparents waived any right they may have to challenge Student's IEP placement?

4. Whether the result of any contest concerning or challenge to Student's IEP placement is foreclosed/ predetermined by the terms of the mediated agreement?

5. Whether grandparents should be permitted to circumvent the provisions of the mediated agreement?

6. Whether the DPHO has jurisdiction to set aside a mediated agreement where both parties were represented by counsel and the terms are unambiguous?

7. Any and all issues that may be identified following District's receipt and review of Student's records from Presbyterian Ear Institute (PEI)?

FINDINGS OF FACT[1]

1. Student is an eight-year-old girl who has been identified as eligible for special education services as a result of being deaf and hard of hearing. *Exh C, TR 42, 45*

2. Student currently resides with her grandparents, who are her kinship guardianship parents, in the LEA. *TR 240-241*

3. Student received cochlear implants in both ears at age three. *Exhs 5, 9, TR 61-63, 87*

4. Grandparents previously filed a request for due process hearing on December 8, 2008 which was later voluntarily dismissed with prejudice as a result of a mediated agreement. *Exhs A, 8, TR 14*

5. The mediated agreement signed on January 15, 2009 provided that District would continue to pay mileage for the 210 mile round-trip, five days a week, to enable Student to continue attending

[1] To the extent that the following findings of fact contain conclusions of law or that the conclusions of law are findings of fact, they should be so considered without regard to the given labels. Bonnie Ann F. v. Callahan Independent School Bd., *835 F. Supp. 340 (1993).* All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent that these contentions are in accordance with the findings and conclusions stated herein, they have been accepted. To the extent that they are inconsistent, they have been rejected or deemed irrelevant or not necessary to a proper determination of the issues presented.

Presbyterian Ear Institute (PEI) while new evaluations were being completed and an IEP developed based upon a multidisciplinary report and other independent evaluations. The parties also agreed that "if the IEP team determines that the placement at District is appropriate and the Parents [sic] choose to continue [Student's] attendance at PEI for the 2009-2010 school year, that will constitute a unilateral, parental placement." *Exh. B*

6. The IEP team meeting on September 18, 2009 determined, over objections from grandparents and representative from PEI, that District could provide Student FAPE in the LRE in a mainstreamed class with supports. *Exh. C*

7. A second due process hearing request challenging the September 18, 2009 IEP (developed for the 2009-2010 school year) as not providing FAPE, was filed October 27, 2009. *DPHO Exh. 1*

8. Student is presently attending PEI, and has been since 2004 with the concurrence of District up until the IEP of September 18, 2009. She is now in the second grade. *Exh. A, TR 252-257*

9. A private school for the oral/deaf located in Albuquerque, PEI serves approximately seventeen students from ages two to nine who are implanted with cochlear implants. *TR 81*

10. Student is in a class with one oral/deaf teacher and three students who are approximately her own age. *TR 102, 106, 173, 124-125*

11. The "End of Year Conference Reports" (called "IEPs" by PEI) developed by PEI prior to September 18, 2009 were based upon MOOG curriculum and did not follow state or federal standards for public school IEPs. *TR 100-101,109, 182, 210, 319-323*

12. MOOG curriculum places an emphasis on language development, focusing on speech acquisition and oral communications. *TR 96-97, 100, 103, 172*

13. As a private school, PEI does not administer the New Mexico Standards Based Assessments for students in the third grade, does not capture New Mexico state standards and benchmarks in the areas of science, social studies, math and physical education, and does not employ teachers certified to teach as special or general education teachers. *TR 101, 106, 108, 123-125, 206-209, 212-213, 223-224*

14. PEI does not employ ancillary staff (e.g., physical therapists, occupational therapists, educational diagnosticians). *TR 105, 107*

15. The independent audiology evaluation, performed by PEI's audiologist, Dr. Crystal Baca, tested Student in May, 2009. This expert believed Student's hearing deficits reflected in her ability to correctly hear and discriminate words was an impediment to mainstreaming and that she should remain at PEI for the upcoming school year. *Exh 6, TR 46*

16. PEI's Cochlear Implant Coordinator, Dr. Christine Epstein, testified that the goal of PEI is to mainstream its students once they are able to keep up with hearing peers. *TR 84-85, 200*

17. This credible expert witness consults with school districts' audiologists in transitioning children into public schools. *TR 76-77*

18. LEAs are not responsible for the costs of mapping in New Mexico. *TR 79*

19. According to Dr. Royal, the independent educational diagnostician from EASi who prepared the multidisciplinary evaluation report, Student has difficulty in vocabulary and passage comprehension. In her report of August 4, 2009, she concluded, "Thus, [Student] needs an

educational environment that focuses daily on language and language processing so her emerging language and auditory memory skills continue to develop. Without the necessary prerequisite language skills the student is not ready to continue to make appropriate academic progress." *Exh H, p. 12; TR 131, 139, 144, 177-178*

20. Dr. Royal recommended that if Student were to be mainstreamed she would require a small class setting, and a speech/language therapist to develop language programs. This expert cautioned that all involved with Student's education had to make sure Student actually hears once in the general education classroom. Her education should focus on language and language processing. If the mainstream program were "done adequately," she reluctantly testified, she supposed it could be done. *TR 139-140, 148-149, 155, 158, 165, 167*

21. TASL is the acronym for "Teacher Assessment of Spoken Language," and is a measurement for oral/deaf hearing ability of students with cochlear implants. *TR 187*

22. Student's language and reading skills have improved over the eighteen months her oral/deaf teacher has been instructing her when she started at a TASL level of 3 (i.e., using sentences of at least six words with one verb). *TR 177, 187*

23. Student functioned at a TASL level 4 at the time of the multidisciplinary evaluations, just prior to the time District's IEP was developed (i.e., using sentences of eight or more words with at least two verbs). *TR 148-149, 187, 189*

24. A Student is not predicted to function successfully in a regular education classroom unless a student has attained TASL Level 5 (i.e., ten or more words using at least 3 verb forms). *Exh. 5, TR 186-187*

25. According to TASL standards, a student can be successfully mainstreamed, with accommodations and modifications, at the time he or she attains Level 5. *TR 221*

26. According to Student's PEI oral/deaf teacher, the primary consideration in transitioning a child to public schools is the TASL, among other factors. *TR 221*

27. The TASL is an objective measurement. *Exh 5, TR 238, 302*

28. Student reached TASL Level 5 sometime during the fall semester of the 2009-2010 school year, but was not actually tested at Level 5 until December, 2009. *TR 198-199*

29. Student had not yet completed Level 5 at the time of the hearing. *TR 224, 263*

30. A child ages out of PEI at age nine. *TR 222-223*

31. Student will attain age nine in September 2010, but according to her grandmother will graduate from PEI in May, 2010. *TR 264*

32. Grandparents want Student to continue at PEI and want transportation costs reimbursed as in the past. *TR 262-263*

33. Although Student's present oral/deaf teacher at PEI strongly recommended that Student remain at PEI for the 2009-2010 school year because Student still needs to make additional gains in language ability, she is biased. Many of the teacher's recommendations were incorporated into the September 18, 2009 IEP, including FM, S/L therapy, extra time for assignments, small group setting, preferential sitting, minimization of auditory and visual distractions, study aids, and extra time for responding. *TR 218-219, 227-229*

34. District's IEP provides that Student attend the general education setting in a small classroom with 15 children, special education support and small group instruction for 40% to 79%

of the school day, that she receive 2.5 hours of S/L therapy per week, 7.5 hours of special education instruction per week, a FM system, and in-service PEI technical support. *Exh. H, TR 75-76, 196-197, 220, 317*

35. District's credible expert witness, Ms. Rosemary Gallegos, Assistant Superintendent of the School for the Deaf (responsible for outreach programs and compliance), consults with staff in the LEA and is available to do individual outreach plans with teachers for specific students. *TR 308-310, 339-340*

36. In her review of the proposed IEP, this expert felt that a couple of hours of speech/language therapy on a pullout basis per week was sufficient, with the caveat that the SLP communicate skills that are being worked on to the classroom teacher. *TR 335-336*

37. District's expert was also of the opinion that MOOG curriculum as an academic program is inadequate and that reliance on that curriculum alone is a flawed educational approach. *TR 100-101, 210, 319, 323*

38. Educational programming offered to Student by PEI is academically insufficient to meet Student's academic needs. *Exhibit 9, TR 103, 123, 127, 175-176, 223-234*

39. PEI does not offer Student exposure to her typically developing peers crucial to Student's academic and social development. *Exhs 9, C, TR 82, 128*

40. By declining services on the Prior Written Notice (PWN) form grandparents did not intend to waive their right to challenge District's IEP. *Exh C, p.31*

CONCLUSIONS OF LAW

l. The due process hearing officer has jurisdiction over this matter pursuant to the Individuals with Disabilities Act (IDEA), *20 U.S.C. §§ 1400, et seq., (2004), 34 CFR §§ 300.511-300.514 (2006),* and the New Mexico Special Education Regulations, *6.31.2.13 (I) NMAC (2007).*

2. All procedural safeguards required by IDEA, this statute's implementing regulations, and the New Mexico Special Education Regulations have been complied with.

3. The time limits imposed by IDEA and state regulations have been extended by the hearing officer upon request of a party or parties to this action, for good cause shown. *34 CFR § 300.515(c)(2006)*

4. To be eligible for special education services under IDEA, a child must have a disability as defined in 34 CFR § 300.7(b)(2). Student is eligible for special education and related services under the categories of Deaf and Hard of Hearing. *34 CFR §§ 300.8(c)(2006)*

5. Petitioners bear the burden of proving by a preponderance of the evidence that the private, unilateral placement is appropriate while the educational plan and placement proposed by District is not. *Schaffer V. Weast, 546 U.S. 49,58 (2005), 34 CFR § 300. 148(b)*

6. Pursuant to the parties' mediated agreement, the placement in a private school in the fall semester of 2009 is deemed a private placement, not endorsed by District. *Burlington Sch. Comm .v. Department of Educ., et al, 471 U.S. 359, 373-374 (1985); Florence County Sch. District v. Shannon Carter, et al, 510 U.S. 7, 15 (1993)*

7. The IEPs developed for Student from 2004 to 2008 were not in strict conformance with the standards for IEPs mandated by the NMPED and IDEA. *34 CFR § 300.320, 34 CFR §300.324 (2006)*

8. District did not adequately consider the strengths of the child, the concerns of grandparents for enhancing the education of Student, the results of the initial evaluation or the most recent evaluation of the child, and the academic, developmental and functional needs of Student in developing its 2009-2010 IEP, as required by IDEA. *34 CFR § 300.324(3)(A)(i)(ii)(iii)(iv)(2006)*

9. Special factors to be considered in IEP development for a deaf/hard of hearing student are the child's language and communication needs, opportunities for direct communication with peers and professional personnel in the child's language and communication mode, academic level and full range of needs. These factors were not adequately considered in the development of the September 18, 2009 IEP. *34 CFR § 300.324(a)(iv)(2006)*

10. District's IEP of September 18, 2009 did not meet Student's unique educational needs at the time the IEP was developed, based upon Student's TASL Level 4 and other factors (e.g., vocabulary and comprehension deficiencies) identified in the independent evaluations performed months prior to that meeting.

11. District's IEP dated September 18, 2009 was not reasonably calculated to confer educational benefit in that Student's readiness to be mainstreamed (as determined by TASL Levels and other evaluation factors) was not considered.

12. TASL measurements represent an objective standard of a Student's ability to enter a mainstream program and function successfully in that placement.

13. Petitioners in their case-in-chief and the exhibits that were admitted through their witnesses presented a *prima facie* case that District's IEP of September 18, 2009 was not appropriate for Student *at that time* and did not represent FAPE. *20 U.S.C. 1412(a)(10)(C); 34 CFR § 300. 148*

(2006)

14. Grandparents and their representatives actively participated in all phases of IEP development and as an integral part of the IEP team. *34 CFR § 300.501(c)(1); 6.31.2.13(C) NMAC*

15. Petitioners rejected District's educational plan, but did not waive their right to challenge District's IEP by declining services on the PWN form.

16. Private placement disagreements are subject to due process. *34 CFR 300.148(b), 34 CFR §§ 300.504-300.520*

17. Petitioners have met their burden of proof by a preponderance of the evidence by showing that the private placement at PEI was an appropriate educational setting for Student in the fall semester of 2009.

18. The private placement at PEI is not an appropriate setting for Student at the present time in that it does not provide education in the least restrictive environment (LRE). *34 CFR § 300.116 (2006)*

19. District's IEP represents FAPE in the LRE at the present time. *20 U.S.C. 1412(5)(A), 34 CFR § 300.116 (2006)*

20. District's IEP will provide educational benefit and FAPE for Student consistent with IDEA and state standards. *Board of Education v. Rowley, 458 U.S. 176, 207 (1982)*

21. A private placement does not have to meet state standards to represent an appropriate placement subject to reimbursement. *34 CFR § 300.148(c)(2006)*

22. Petitioners are entitled to reimbursement for transportation expenses through December 31, 2009. *34 CFR § 300.148(c)(2006)*; *20 U.S.C. 1412(a)(10)(C)(ii)*

DISCUSSION

Mediated Agreement

District argues that by virtue of conducting a due process hearing the hearing officer is setting aside the mediated agreement. On the contrary, the mediated agreement represents the law of this case. The parties agreed that PEI would be deemed a private placement in the event the IEP team decided that Student be mainstreamed in the 2009-2010 school year. Perhaps it was implied to District, but grandparents did not expressly agree in the mediated agreement that they would not challenge the team's decision as it affected the 2009-2010 school year. They agreed only that continued attendance at PEI would be deemed a private placement.

Several factors have intervened since the mediated agreement was effected, notably, consideration of evaluations (including strengths and weaknesses of Student), and academic progress of Student at PEI. The evaluations alone leave some doubt whether the IEP team's decision to mainstream was reasonably calculated to confer educational benefit *at that time* or whether it was based upon the LEA's single-minded belief that their choice was timely and better.

The same holds true for grandparents' continued insistence that Student's education at PEI is the sole alternative. A school district is not obligated to provide the precise education the parents demand or desire. *Deal v. Hamilton Dept. of Educ., 259 F. Supp. 2d 687, 46 IDELR 45 (E.D. Tenn 2006), affirmed, 258 F. App'x 863, 49 IDELR 123 (6th Cir. 2008); Shaw v. Dist. of Columbia, 238 F. Supp. 2d 127, 139 (D.D.C. 2002)*

Based upon the actual written terms of the mediated agreement, grandparents in this

case did not expressly waive their right to challenge an IEP as an inappropriate placement. The hearing officer has jurisdiction to enforce the terms of a mediated agreement and to hear the challenge to an inappropriate placement versus a unilateral, private placement. *Linn-Mar Community School Dist., 41 IDELR 24 (SEA Iowa 2004), 34 CFR § 300.148*

Res Judicata

District also argues, unconvincingly, that the mediated agreement and dismissal of the previous due process request with prejudice in January, 2009 constitutes *res judicata*. The mediated agreement resolved issues between the parties in the 2008-2009 school year and laid the ground rules for the 2009-2010 IEP. The parties' respective positions as to placement may not have changed, however, the material facts of the case were altered by the multidisciplinary evaluations and the 2009-2010 IEP process.

The doctrine of *res judicata* is that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction...cannot be disputed in a subsequent suit between the same parties or their privies." Under the doctrine of *res judicata,* a final judgment on the merits bars further claims by parties or their privies based upon the same cause of action. *Ross v. Bd. Educ., 486 F. 3d 279, 47 IDELR 242 (7th Cir. 2007), citing Southern Pacific R. Co. v. United States, 168 U.S. 1, 48-49, 18 S.Ct., 18, 27 (1897), Cromwell v. County of Sac, 94 U.S. 351, 352 (1877), and Lawlor v. National Screen Service Corp., 349 U.S. 322, 326, 75 S. Ct., 865, 867 (1955).* The *Lawlor* court identified three requirements that must be satisfied under claim preclusion: 1) identity of the claim, 2) identity of the parties, and 3) a final judgment on the merits. *Lawlor, Id.; Gonzales v. Banco Central Corp., 27 F. 3d 751, 755 (1st Cir. 1994); Katz v. Timberline Regional School Dist., 184 F.*

*Supp. 2d 124 Res judicata/*claim preclusion applies to administrative proceedings, as well, and settlement/mediated agreements. *Letter to Breecher, OSEP, 16 IDELR 1401 (OSEP 1990); Sherwood School District (1997), 25 IDELR 1254*

The cases cited by District do not support their position and can be distinguished. *Welsing v. Government of District of Columbia, 18 IDELR 1016 (D.D.C. 1992) [settlement of an employment case where plaintiff agreed to take the benefits of early retirement and then litigated to be reinstated]; Ross, op.cit. [strikingly similar cases both filed in federal district court]; Moubry v. Independent Sch. Dist. No. 696, 32 IDELR 90 (U.S. Dist. Minn 2000) [four due process hearings and four district court cases on same issues; parents' counsel essentially admitted issues in all previous cases were identical]; Frutiger v. Hamilton Central School Dist., 644 N.Y.S. 2d, 24 IDELR 356 (NY Sup. Ct. 1996) [concurrent state and federal court claims; voluntary dismissal of federal action]*

Linn-Mar actually supports the decision of the DPHO *[ALJ denied claims of res judicata and issue preclusion applied because of previous settlements with parents did not preclude relitigation]*. *Linn-Mar, op.cit.* In the instant case, material facts have changed with respect to Student and, most importantly, the IEP time periods at issue are not the same. Grandparents are now challenging the September 18, 2009 IEP which affects the 2009-2010 school year while the mediated agreement affected claims made up until the date of the agreement, placement during the spring semester of the 2008-2009 school year, an agreement to evaluate (the bases for the 2009-2010 school year IEP), and private placement status. There was a dismissal of the first complaint with prejudice. There is no waiver or release of future claims.

While deference is given to decisions by professional educators, the purpose of IDEA

due process is to allow parties to contest IEP decisions if those decisions are not in compliance with IDEA mandates. If an IEP team came up with an educational plan that completely flaunted the views of evaluators and previous teachers, would parents have no recourse to challenge that placement decision because of an agreement, not expressly waiving a challenge, entered into nine months earlier? This DPHO thinks not. This is not a case of *res judicata.*

Appropriate Placement

The issues in this case turn on which venue represents the appropriate educational setting for a deaf/oral student – the oral/deaf private school located 210 miles from Student's home or the LEA's mainstreamed classroom. The issues have been fomenting since the 2008-2009 school year, resulting in the filing of a complaint for due process in December, 2008 and culminating in a mediated agreement dismissing that complaint in January 2009, with all parties agreeing if the IEP team determined otherwise for the 2009-2010 school year, a continued placement at PEI would be deemed a private placement. The DPHO so held in dismissing District's Motion for Summary Judgment based upon the terms of the mediated agreement. *DPHO Exhs 6,8*

The two-pronged test for a private placement is 1) whether the LEA's IEP proposed placement provides FAPE, and, if not, 2) whether the unilateral placement is appropriate? *Burlington, op cit.; Florence County, op cit.* Grandparents, while agreeing that PEI is a private placement, never really had confidence that District could provide an appropriate public education for this child. Evaluations performed by the PEI audiologist and the oral/deaf teacher's experience with Student strongly favored continued attendance at PEI. They are not without bias. The cochlear implant coordinator declined to give an opinion, as outside the area of her expertise. The independent

multidisciplinary evaluator also declined to give a placement recommendation, leaving it in the province of the IEP team. The evidence, however, focusing on Student's individualized needs and her lack of readiness to be mainstreamed, indicated that PEI was an appropriate, although private, placement in the fall semester and that a mainstream classroom was not.

Based upon *Rowley's* two-pronged test for FAPE: *Has the LEA complied with procedures set forth in IDEA? Is the Student's IEP reasonably calculated to enable the student to receive educational benefit?,* it is concluded that the IEP of September 18, 2009 at this point in time satisfies FAPE requirements by providing meaningful access in the LRE, and by conferring some (but not necessarily maximizing) educational benefit. *Rowley, op.cit*. It is understandable that grandparents are anxious, protective, and unshakenly convinced that the best alternative is the same private school the Student has attended for the past five years, however, that is not the criteria under IDEA. IDEA requires the least restrictive environment and an educational plan that will benefit a student, not the best possible education. The evidence clearly indicates that the education Student was receiving was not up to academic standards, that Student would benefit from a more expansive educational environment, and that she is ready for same.

Least Restrictive Environment

The appropriateness of a unilateral placement includes an examination of whether that placement complies with LRE requirements. *Independent School Dist. No. 83 v. S.D., 88 F. 3d 556, 561 (8th Cir. 1996)* An IEP team developing an educational plan for a deaf or hard of hearing student is mandated to "consider the child's language and communication needs, opportunities for direct communication with peers and professional personnel in the child's language and communication

mode, academic level and full range of needs, including opportunities for direct instruction in the child's language and communication mode." *34 CFR § 300.324(a)(2)(i)(ii)(iii)(iv)(2006)* LRE for a student, including those who are deaf or hard of hearing, is an individualized decision.

The test in the Tenth Circuit for mainstreaming on a case-by-case basis is: 1) whether education in the regular classroom, with the use of supplemental aids and services, can be satisfactorily achieved, and 2) has the LEA mainstreamed the student to the maximum extent possible. *34 CFR § 300.114(a)(2)(i)(2006); L.B. v. Nebo Sch. Dist.. 379 F. 3d 966, 968 (10th Cir. 2004), citing Daniel R.R. v. Bd. of Educ., 874 F. 2d 1036 (5th Cir. 1989); Oberti v. Bd. of Educ, 995 F. 2d 1204, 19 IDELR 908 (3rd Cir. 1993)* Mainstreaming should occur to the maximum extent possible, taking into account the educational and nonacademic benefits, detrimental impact on the classroom and teacher, and distance from student's home. *Thompson R2-J School Dist. V. Luke P., 540 F 3d 1143, 50 IDELR 212 (10th Cir. 2008); Poolaw v. Bishop, 67 F. 3d 830, 23 IDELR 406 (9th Cir. 1995)* PEI does not meet the test of LRE; District's placement does.

Parental Participation, Evaluations, Teacher Input

Pursuant to IDEA regulations, parental participation requirements are met when parents are provided with proper notice and the opportunity to participate. *Buriloivich v. Board of Education of Lincoln, 208 F. 3d 560, 568 (6th Cir., cert denied, 531 U.S. 957 (2000).* Grandparents were represented by counsel at both the mediation session, the due process hearing, and at all steps in between. Grandparents' counsel attended the IEP meeting. *[Exhibits B, C]* It cannot be argued that grandparents did not actively and meaningfully participate in the process.

Neither can it be argued that evaluations and teacher input were not considered. Many

of the teacher's recommendations found their way into the IEP. Independent evaluations pointed to the child's strengths, weaknesses, and educational needs, and, apart from the PEI audiologist's evaluation, did not provide a recommendation as to placement. The critical question at that time, and the question remaining at the time of hearing, was whether Student was ready to be mainstreamed. The IEP team had a supportable basis for coming to a different, if premature, conclusion. The IEP team under IDEA provisions seeks consensus, but in the end, the team makes the decision. *Blackmon v. Springfield R-XII School Dist., 198 F. 3d 648, 657 (8th Cir. 1999); 34 CFR § 300.501 (2006); Lachman v. Illinois State Bd. of Educ., 441 IDELR 156, 852 F. 2d 290 (7th Cir. 1988), cert. denied, 488 U.S. 925 (1988); Thompson, op cit.*; *Doyle v. Arlington County School Board, 953 . 2d 100 (4th Cir. 1991)*

Other Issues

Any other issues raised in the request for due process and the response have been covered by findings of fact and conclusions of law herein.

Remedy

Grandparents request as a remedy that District reverse its decision to terminate transportation costs that enable Student to continue to attend PEI, assuring that Student receives FAPE. *Exh C* Reimbursement for the cost of the private placement may be awarded if it is found that the LEA had not made FAPE available to a student in a timely manner and that private placement is appropriate. *Burlington, op.cit,. Florence County, op.cit.,34 CFR § 300.148(c)* Hearing officers have the authority to grant relief based upon the findings. *20 U.S.C. 1415(f)(3)*(E)

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, THAT:

1. District shall reimburse grandparents within thirty days documented transportation expenses for Student's attendance at PEI through December 31, 2009, at the usual rate and subject to the usual verification. After that date, District no longer has any obligation to pay for transportation for this unilateral placement.

2. Student will be transitioned into District's elementary school based upon the IEP of September 18, 2009, if the grandparents so elect, with additional monitoring of Student's transition into a mainstream setting.

3. Additional monitoring will involve a monthly conference between Dr. Epstein of PEI, Ms. Gallegos of the NM School for the Deaf, and LEA staff responsible for Student's education, commencing at least one month after Student is enrolled in the LEA and continuing until the next IEP. The purpose of the monthly conference is to ascertain how well Student is functioning in the mainstream setting and to make ongoing adjustments in modifications and accommodations as needed. The monthly conference may be held telephonically.

4. Student's next IEP, scheduled on or before September 2010, will be facilitated, with Ms. Gallegos and Dr. Epstein in attendance at District's expense.

Appeal

Any party aggrieved by this decision has the right to bring a civil action in a court of competent jurisdiction pursuant to *20 U.S.C § 1415(I)* (2004), *34 CFR § 300.516, and*

6.31.2.13(I)(25) NMAC (2007). Any such action must be filed within thirty (30) days of receipt of this Decision by the appealing party by certified mail.

THIS DECISION WAS ENTERED THIS 4th DAY OF FEBRUARY, 2010

_____
Muriel McClelland
Due Process Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Final Decision of the Due Process

Hearing Officer was sent by certified mail, return receipt requested, on February 4, 2010, to Dr. Veronica Garcia, Secretary of Education, State of New Mexico Public Education Department, 300 Don Gaspar, Santa Fe, New Mexico 87501-2786, and to the following counsel of record in this proceeding. The decision was also emailed on February 8, 2010, to all counsel.

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Muriel McClelland
Due Process Hearing Officer