STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM

IN THE MATTER OF:

J.B. o/b/o A.B.,
Petitioner

v

Whitehall District Schools,
Respondent

_____/

Docket No.: 17-009001

Case No.: 17-00043

Agency: Education

Case Type: ED Sp Ed Regular

Filing Type: Appeal

Issued and entered
this 22nd day of November, 2017
by: Christopher S. Saunders
Administrative Law Judge

DECISION AND ORDER

PROCEDURAL HISTORY

Appearances: Attorney Myra Dutton appeared on behalf of J.B o/b/o A.B., Petitioner. Attorney Michelle Eaddy appeared on behalf of Whitehall District Schools, Respondent.

This matter concerns a due process hearing request/complaint under the Individuals with Disabilities Education Act (IDEA) 20 USC 1400 *et seq*.

On April 26, 2017, Petitioner filed a due process request/complaint with the Michigan Department of Education on behalf of her daughter (Student)[1]. It was forwarded to the Michigan Administrative Hearing System (MAHS) and assigned to Administrative Law Judge (ALJ) Christopher S. Saunders.

A prehearing conference was held on May 26, 2017, wherein the issues for hearing were delineated and the hearing was scheduled for dates in July. On June 14, 2017, an additional prehearing was held where Petitioner requested an adjournment of the hearing dates to allow more time for discovery and to attempt mediation again. The hearing dates were adjourned to later dates in July, specifically July 24, 25, 26, 27, and 28, 2017. On July 17, 2017, a prehearing conference was conducted at the request of Petitioner. Based on a family medical need, Petitioner requested that the hearing dates be adjourned. The request was granted and the hearing was scheduled for September 7, 8, 14, and 15, 2017.

[1] To protect the privacy of the minor child, Student is substituted the child's name.

The hearing was convened on September 7, 2017 at the White Lake Community Center, located in Whitehall, MI. Attorney Myra Dutton appeared on behalf of Petitioner. Petitioner was also present during the hearing. Amanda Thomas, Director of Special Education for Whitehall District Schools was present on behalf of Respondent District. Respondent District was represented by attorney Michele Eaddy. The hearing continued on September 8, 14, and 15, 2017. The hearing concluded on September 15, 2017.

EXHIBITS AND WITNESSES

The following exhibits were offered by Petitioner and Respondent as joint exhibits and admitted into evidence:

1. Joint Exhibit No. 1 is an Individualized Education Program (IEP) Team Report pertaining to Student, with a meeting date of April 17, 2017.

2. Joint Exhibit No. 2 is an Individualized Education Program (IEP) Team Report pertaining to Student, with a meeting date of May 3, 2016.

3. Joint Exhibit No. 3 is an Individualized Education Program (IEP) Team Report pertaining to Student, with a meeting date of May 4, 2015.

4. Joint Exhibit No. 4 is an Individualized Education Program (IEP) Team Report pertaining to Student, with a meeting date of December 4, 2014.

5. Joint Exhibit No. 5 is an Individualized Education Program (IEP) Team Report pertaining to Student, with a meeting date of February 25, 2013.

6. Joint Exhibit No. 6 is an Individualized Education Program (IEP) Team Report pertaining to Student, with a meeting date of February 9, 2012.

7. Joint Exhibit No. 7 is a Whitehall District Schools Eligibility Recommendation pertaining to Student and dated April 17, 2017.

8. Joint Exhibit No. 8 is a Review of Existing Evaluation Data (REED) and Evaluation Plan pertaining to Student and dated February 17, 2017.

9. Joint Exhibit No. 9 is a letter sent to Petitioner from Mandy Thomas, and dated March 7, 2017.

10. Joint Exhibit No. 10 is a Whitehall District Schools Eligibility Recommendation pertaining to Student and dated December 4, 2014.

11. Joint Exhibit No. 11 is a Multidisciplinary Evaluation Team (MET) Report dated November 25, 2014.

12. Joint Exhibit No. 12 is a Review of Existing Evaluation Data (REED) and Evaluation Plan pertaining to Student and dated October 7, 2014.

13. Joint Exhibit No. 13 contains progress reporting for the IEP dated April 17, 2017.

14. Joint Exhibit No. 14 contains progress reporting for the IEP dated May 3, 2016.

15. Joint Exhibit No. 15 contains progress reporting for the IEP dated May 4, 2015.

16. Joint Exhibit No. 16 contains progress reporting for the IEP dated December 4, 2014.

17. Joint Exhibit No. 17 contains progress reporting for the IEP dated May 12, 2014.

18. Joint Exhibit No. 18 contains progress reporting for the IEP dated June 3, 2013.

19. Joint Exhibit No. 19 contains progress reporting for the IEP dated February 25, 2013.

20. Joint Exhibit No. 20 contains progress reporting for the IEP dated February 9, 2012.

21. Joint Exhibit No. 21 is Student's second grade report card from Shoreline Elementary for the 2016-2017 school year.

22. Joint Exhibit No. 22 is Student's second grade report card from Shoreline Elementary for the 2015-2016 school year.

23. Joint Exhibit No. 23 is Student's first grade report card from Shoreline Elementary for the 2014-2015 school year.

24. Joint Exhibit No. 24 is Student's kindergarten report card from Shoreline Elementary for the 2013-2014 school year.

25. Joint Exhibit No. 25 is Student's young fives report card from Shoreline Elementary for the 2012-2013 school year.

26. Joint Exhibit No. 26 is a referral packet for Wesley School pertaining to Student with attachments and dated February 22, 2017.

27. Joint Exhibit No. 27 is a Wesley observation pertaining to Student and dated October 25, 2016.

28. Joint Exhibit No. 28 contains assistive technology and augmentative communication observations of Student from December 8, 2016; December 15, 2016; and January 16, 2017.

29. Joint Exhibit No. 29 is a letter from Spectrum Health pertaining to Student and dated November 18, 2014.

The following exhibits were offered by Petitioner and admitted into evidence, not admitted into evidence due to objection, or not offered by Petitioner:

1. Petitioner's Exhibit No. 1 is a document titled "A Guide to Understanding MPS III" produced by the National MPS Society.

2. Petitioner's Exhibit No. 2 is a document titled "Education Strategies and Resources A Guide for Parents" produced by the National MPS Society.

3. Petitioner's Exhibit No. 3 contains observation notes of Julie Steketee, OT and Kasey Cooney, Curriculum/Behavior coordinator pertaining to Student from March 10, 2017.

4. Petitioner's Exhibit No. 4 is the curriculum vitae for Catherine Adams.

5. Petitioner's Exhibit No. 5 was not offered into evidence.

6. Petitioner's Exhibit No. 6 was not offered into evidence.

7. Petitioner's Exhibit No. 7 was not offered into evidence.

8. Petitioner's Exhibit No. 8 contains emails between Mandy Thomas, Mary Purtee, Corinn Hower, and Amanda Krentz from November 21, 2016 through March 9, 2017.

9. Petitioner's Exhibit No. 9 is a parent contact log with dates from August 27, 2015 through January 26, 2016.

10. Petitioner's Exhibit No. 10 was not offered into evidence.

11. Petitioner's Exhibit No. 11 is a request for an assistive technology consultation showing parents notified on the referral on November 7, 2016.

12. Petitioner's Exhibit No. 12 was not offered into evidence.

13. Petitioner's Exhibit No. 13 was admitted in part and excluded in part. The first 5 full pages and the first side of the sixth page were excluded based on Respondent's sustained objection to a lack of foundation. The second side of the sixth page and the rest of the documents in this exhibit were admitted and contain handwritten speech therapy notes and an email dated November 20, 2016.

14. Petitioner's Exhibit No. 14 was not offered into evidence.

15. Petitioner's Exhibit No. 15 was not offered into evidence.

16. Petitioner's Exhibit No. 16 was not offered into evidence.

17. Petitioner's Exhibit No. 17 was not offered into evidence.

18. Petitioner's Exhibit No. 18 was not offered into evidence.

19. Petitioner's Exhibit No. 19 was not offered into evidence.

20. Petitioner's Exhibit No. 20 was not offered into evidence.

21. Petitioner's Exhibit No. 21 contains email communications between school staff and between school staff and Petitioner from September 30, 2014 through April 28, 2017.

22. Petitioner's Exhibit No. 22 contains notes written by Student's second grade classmates to Student containing their "good thoughts" pertaining to Student for the 2016-2017 school year.

23. Petitioner's Exhibit No. 23 is an authorization for non-prescribed medication or treatment pertaining to Student and signed by Petitioner on January 11, 2017.

The following are exhibits that were offered by Respondent and admitted into evidence, not admitted into evidence due to objection, or not offered by Respondent:

1. Respondent's Exhibit A consists of social engagement data pertaining to Student, observed and compiled by Roxanna Osburn.

2. Respondent's Exhibit B contains data pertaining to opportunities to respond regarding Student, as observed by Paula Martin.

3. Respondent's Exhibit C contains 15 minute increment OTR data compiled by Marianne Bassett.

4. Respondent's Exhibit D was not offered into evidence.

5. Respondent's Exhibit E was not offered into evidence.

6. Respondent's Exhibit F was not offered into evidence.

7. Respondent's Exhibit G was not offered into evidence.

8. Respondent's Exhibit H is diaper changing protocol for Student, created by Respondent.

9. Respondent's Exhibit I is a document titled "dystonia data collection".

10. Respondent's Exhibit J contains data pertaining to Student's sleeping, the collection of which began the week of November 21, 2016.

11. Respondent's Exhibit K was not offered into evidence.

12. Respondent's Exhibit L was not offered into evidence.

13. Respondent's Exhibit M was not offered into evidence.

14. Respondent's Exhibit N contains toileting data collected pertaining to Student.

15. Respondent's Exhibit O was not offered into evidence.

16. Respondent's Exhibit P was not offered into evidence.

17. Respondent's Exhibit Q was not offered into evidence.

18. Respondent's Exhibit R was not offered into evidence.

19. Respondent's Exhibit S was not offered into evidence.

20. Respondent's Exhibit T is a request for information form sent to Student's physician and signed by such on October 10, 2016.

21. Respondent's Exhibit U contains email communications between Petitioner and Amanda Krentz.

22. Respondent's Exhibit V contains email communications between Petitioner and David Hunt.

23. Respondent's Exhibit W was not offered into evidence.

24. Respondent's Exhibit X was not offered into evidence.

25. Respondent's Exhibit Y was not offered into evidence.

26. Respondent's Exhibit Z was not offered into evidence.

27. Respondent's Exhibit AA was not offered into evidence.

28. Respondent's Exhibit BB was not offered into evidence.

29. Respondent's Exhibit CC was not offered into evidence.

30. Respondent's Exhibit DD was not offered into evidence.

31. Respondent's Exhibit EE was not offered into evidence.

32. Respondent's Exhibit FF was not offered into evidence.

33. Respondent's Exhibit GG was not offered into evidence.

34. Respondent's Exhibit HH was not offered into evidence.

35. Respondent's Exhibit II was not offered into evidence.

36. Respondent's Exhibit JJ was not offered into evidence.

37. Respondent's Exhibit KK was not offered into evidence.

38. Respondent's Exhibit LL was not offered into evidence.

39. Respondent's Exhibit MM was not offered into evidence.

40. Respondent's Exhibit NN was not offered into evidence.

41. Respondent's Exhibit OO was not offered into evidence.

42. Respondent's Exhibit PP was not offered into evidence.

43. Respondent's Exhibit QQ was not offered into evidence.

44. Respondent's Exhibit RR was not offered into evidence.

45. Respondent's Exhibit SS was not offered into evidence.

46. Respondent's Exhibit TT is a request for assistive technology consultation and attachment from November of 2016.

47. Respondent's Exhibit UU was not offered into evidence.

48. Respondent's Exhibit VV was not offered into evidence.

49. Respondent's Exhibit WW was not offered into evidence.

50. Respondent's Exhibit XX was not offered into evidence.

51. Respondent's Exhibit YY was not offered into evidence.

52. Respondent's Exhibit ZZ was not offered into evidence

The following individuals testified in this matter:

1. Petitioner: J.B., Student's mother.

2. L.B.: Student's father.

3. Stacie Hopkins-Schrumph: Behavior Consultant, Muskegon Area ISD.

4. Amanda Thomas: Director of Special Education, Whitehall District Schools.

5. Amanda Krentz: Special Education Teacher, Shoreline Elementary.

6. Julie Steketee: Occupational Therapist, Muskegon Area ISD.

7. Katie Patton: Teacher, Wesley School.

8. Mary Bradley: Principal, Wesley School.

9. Corinn Hower: Assistive Technology Consultant, Muskegon Area ISD.

10. Louise Crough: At home caretaker for Student and her family.

11. Kim Moon: Intensive Resource Room Teacher, Shoreline Elementary.

12. Mary Purtee: Teacher Consultant, Muskegon Area ISD.

13. Amie Jean Van Amberg: General Education Teacher, Shoreline Elementary.

14. Kristie Spoon: Special Education Paraprofessional, Whitehall District Schools.

15. Karl Nicles, M.D.: Student's pediatrician.

16. Roxanna Osburn: Social Worker, Shoreline Elementary.

17. David Hundt: Principal, Shoreline Elementary.

18. Paula Martin: Occupational Therapist, Whitehall District Schools.

19. Katherine Adams: Former Principal, Wesley School.

20. Stephanie Dye (formerly Lathrup): Behavioral Consultant, Muskegon Area ISD.

21. Marianne Bassett: Speech Pathologist, Whitehall District Schools.

22. Jerry McDowell: Superintendent, Whitehall District Schools.

23. Ronald Bailey: Principal, Ealy Elementary.

At the conclusion of the hearing, a briefing schedule was discussed between the parties and an order outlining the dates was issued. Both parties submitted briefs and replies in accordance with the briefing order.

ISSUES

1. Did Respondent commit procedural violations of the IDEA regarding the April 17, 2017 IEP by predetermining the IEP prior to the meeting?

2. Does the April 17, 2017 IEP operate to provide Student with a free and appropriate public education (FAPE) in the least restrictive environment (LRE)?

APPLICABLE LAW

The petitioner-parent, as the party challenging the District's determination or implementation of special education and related services, has the burden of proof by a

preponderance of the evidence for all claims raised in this matter. *Schaffer v Weast,* 546 US 49; 126 S Ct 528; 163 L Ed 2d 387 (2005); Doe *v Defendant I,* 898 F2d 1186 (CA 6, 1990).

The Code of Federal Regulations, 34 CFR 300.39 defines "special education" as follows:

> Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including— (i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (ii) Instruction in physical education. 34 CFR 300.39(a)(1).

Michigan Administrative Rule for Special Education, R 340.1701c(c) defines "special education" as follows:

> "Special education" means specially designed instruction, at no cost to the parents, to meet the unique educational needs of the student with a disability and to develop the student's maximum potential. Special education includes instructional services defined in R 340.1701b (a) and related services.

The Federal Regulations define "specially designed instruction" as follows:

> Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—
>
> (i) To address the unique needs of the child that result from the child's disability; and
>
> (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 CFR 300.39(b)(3).

Students protected by the provisions of IDEA are entitled to be appropriately identified, evaluated, placed, and provided a free appropriate public education (FAPE) that includes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 20 USC 1400(d); 34 CFR 300.1.

Under 20 USC 1415(f)(3)(E), it may be found that FAPE has been denied to a disabled student based on either substantive or procedural violations of the Individuals with Disabilities Education Act (IDEA or Act). To find a denial of FAPE based on procedural violations of the Act, it must also be found that the procedural violation impeded the student's right to FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE to their child, or caused a deprivation of educational benefits.

In *Board of Education of Hendrick Hudson Central School District v Rowley,* 458 US 176, 102 S Ct 3034, 73 L Ed 2d 690 (1982), the U.S. Supreme Court articulated the two bases for assessing the provision of FAPE. The first was whether the school district had complied with the procedural requirements of the Act, and the second was whether the student's Individualized Educational Program (IEP) was "reasonably calculated" to enable the student to receive educational benefits. *Id.,* at 206-07.

In assessing whether a student's IEP was reasonably calculated to enable the student to receive educational benefits under *Rowley*'s second basis above, our Sixth Circuit Court of Appeals noted that nothing in *Rowley* precludes the setting of a higher standard than the provision of "some" or "any" educational benefit, and held that the IDEA requires an IEP to confer a "meaningful educational benefit gauged in relation to the potential of the child at issue." *Deal v Hamilton County Bd of Ed*, 392 F3d 840, 862 (CA 6, 2004).

Nevertheless, the IDEA requirement that school districts provide disabled children with a free appropriate public education does not require that a school either maximize a student's potential or provide the best possible education at public expense. *Doe v Tullahoma City Schools,* 9 F3d 455 (CA 6, 1993); *Fort Zumwalt Sch Dist v Clynes,* 119 F3d 607, 612 (CA 8, 1997), *cert den,* 523 US 1137 (1998). In the recent case of *Endrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174 (U.S. 2017), the US Supreme Court expanded its explanation of a free and appropriate public education (FAPE) in *Rowley* and stated that in order to provide a FAPE, the IDEA requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.

The primary responsibility for formulating the education to be accorded a disabled child, and for choosing the educational method most suitable to the child's needs, was left by IDEA to state and local educational agencies in cooperation with the parents or guardians of the child. Reviewing courts may not substitute their own notions of sound educational policy for those of the school authorities which they review. *McLaughlin v. Holt Pub Schs*, 320 F3d 663 (CA 6, 2003).

A school district is required to ensure that a disabled student is educated in the least restrictive environment (LRE); to the maximum extent appropriate with children who are

non-disabled. Removal of a disabled student from the general education environment is to occur only if the nature or severity of the student's disability is such that education in the general education classroom with the use of supplementary aids and services cannot be achieved satisfactorily. 20 USC 1412(a)(5)(A); 34 CFR 300.114.

20 USC 1412(a)(5)(A) presumes that the first placement option considered for each child with a disability is the regular classroom in the school the child would attend if not disabled, with appropriate supplementary aids and services to facilitate such placement. Thus, before a child with a disability can be placed outside the regular educational environment, the full range of supplementary aids and services that could be provided to facilitate the child's placement must be considered. Following that consideration, if a determination is made that a particular child with a disability cannot be educated satisfactorily in the regular educational environment, even with the provision of the appropriate supplementary aids and services, that child could be placed in a setting other than the regular classroom. Federal Register, Vol. 71, No. 156, at p. 46588.

The Sixth Circuit has found that the Act's requirement that mainstreaming be provided to the maximum extent appropriate indicates a very strong congressional preference for the placement of disabled students in the general education environment. *Roncker v Walter,* 700 F2d 1058, 1063 (CA 6, 1983). The court also held, however, that the Act does not require mainstreaming in every case, and cited three situations in which education in a segregated special education setting may be necessary: (1) when a disabled student would not benefit from mainstreaming, (2) when any marginal benefits derived from mainstreaming are outweighed by benefits gained from services which cannot feasibly be provided in the general education environment, or (3) when the student is too disruptive to the education of the other general education students. *Id.*

It is a substantive denial of FAPE for an IEP to provide for education of a student in a more restrictive environment than that in which it could otherwise be achieved satisfactorily with any needed supplementary aids and services. In saying this, though, it must also be emphasized that the Act expressly acknowledges that the nature or severity of a student's disability may be such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and Congress has thus recognized that despite the LRE preference, general education classrooms simply are not a suitable setting for the education of many disabled students. *Rowley,* 458 US at 181, n 4.

In determining whether the District provided a free appropriate public education in the least restrictive environment for the student in this case, it must first be asked whether the District has complied with the procedures set forth in the IDEA in developing the IEP, and second, whether the IEP developed through those procedures was reasonably calculated to enable the student to receive a meaningful educational benefit gauged in relation to his potential. *Rowley,* 458 US at 206-07; *Deal*, 392 F3d at 862.

Regarding parental participation in the IEP process, 34 CFR 300.322 states as follows:

> § 300.322
> Parent participation.
>
> (a) *Public agency responsibility—general.* Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate, including—
>
> (1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and
>
> (2) Scheduling the meeting at a mutually agreed on time and place.
>
> (b) *Information provided to parents.*
>
> (1) The notice required under paragraph (a)(1) of this section must—
> (i) Indicate the purpose, time, and location of the meeting and who will be in attendance; and
> (ii) Inform the parents of the provisions in § 300.321(a)(6) and (c) (relating to the participation of other individuals on the IEP Team who have knowledge or special expertise about the child), and § 300.321(f) (relating to the participation of the Part C service coordinator or other representatives of the Part C system at the initial IEP Team meeting for a child previously served under Part C of the Act).
>
> (2) For a child with a disability beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, the notice also must—
> (i) Indicate—
> (A) That a purpose of the meeting will be the consideration of the postsecondary goals and transition services for the child, in accordance with § 300.320(b); and
> (B) That the agency will invite the student; and

(ii) Identify any other agency that will be invited to send a representative.

(c) *Other methods to ensure parent participation.* If neither parent can attend an IEP Team meeting, the public agency must use other methods to ensure parent participation, including individual or conference telephone calls, consistent with § 300.328 (related to alternative means of meeting participation).

(d) *Conducting an IEP Team meeting without a parent in attendance.* A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case, the public agency must keep a record of its attempts to arrange a mutually agreed on time and place, such as—
(1) Detailed records of telephone calls made or attempted and the results of those calls;
(2) Copies of correspondence sent to the parents and any responses received; and
(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(e) *Use of interpreters or other action, as appropriate.* The public agency must take whatever action is necessary to ensure that the parent understands the proceedings of the IEP Team meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English.

(f) *Parent copy of child's IEP.* The public agency must give the parent a copy of the child's IEP at no cost to the parent.

JOINT STIPULATIONS OF FACT AND MATERIAL ADMISSIONS

The parties submitted the following stipulations of fact and material admissions prior to the commencement of the hearing:

1. Petitioner J.B. is A.B's mother.

2. A.B. is 10 years old, born [redacted][2].

3. A.B. suffers from Sanfilippo syndrome type A, a rare, slowly progressing metabolic disorder characterized by developmental delays, behavior issues, sleep disturbances, and intellectual and physical regression for which there is no cure.

4. A.B. is eligible for special education programs and services as a student with a severe multiple impairment ("SXI") pursuant to R 340.1714 of the Michigan Administrative Rules for Special Education.

5. Respondent initially found A.B. eligible for special education under the category of speech and language impairment in February 2012 when she was in preschool.

6. Respondent changed A.B.'s special education eligibility in December 2014 to SXI after a reevaluation and the receipt of the Sanfilippo diagnosis.

7. A.B. has a full scale IQ score of 46, significant/severe speech and language delays, and adaptive behavior scores (extremely low range) commensurate with her FSIQ based on the results of a 2014 reevaluation.

8. A.B.'s cognition, communication, adaptive behavior, social skills, balance and coordination have declined significantly since preschool.

9. Respondent sought and Petitioner denied consent for Respondent to reevaluate A.B. in February of 2017.

10. A.B. currently wears a diaper and is unable to take care of her own toileting or other personal care needs.

11. A.B. requires adult assistance throughout the school day at Whitehall for personal care, behavior, and safety.

12. Shoreline Elementary is Respondent's Pre-K-2 building.

13. A.B. has attended Shoreline Elementary since the 2011-2012 school year when Petitioner enrolled A.B. in preschool.

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[2] The stipulation submitted by the parties on August 30, 2017 states that A.B. is 9 years old, this stipulation has been changed by the undersigned to reflect that Student has had a birthday since the stipulation was prepared and is therefore now 10 years old.

14. A.B. attended Shoreline Elementary for preschool, Young 5's, kindergarten, first grade, and second grade (twice).

15. Respondent retained A.B. in second grade at the end of the 2015-16 school year at Petitioner's request.

16. A.B.'s IEP dated 5/3/16, as amended, placed A.B. in the resource room for the majority of her day with the opportunity to participate in general education 30-150 minutes per week.

17. For the 2016-17 school year, Respondent assigned A.B. to Amanda Krentz's K-2 (intensive) resource room and Amie Van Amberg's second grade classroom.

18. A.B. is designated as a third grader for the 2017-18 school year.

19. Respondent's 3rd grade classrooms are housed at Ealy Elementary, Respondent's 3-5 building.

20. A.B.'s 4/17/17 IEP places A.B. in a SCI classroom at Wesley School for the 2017-2018 school year.

21. Wesley School is a centralized special education facility/center-based program operated by Muskegon Area ISD.

22. Wesley School educates students with disabilities age 3-26 whose needs cannot be adequately met in a less restrictive environment with the use of supplementary aids and supports.

23. Wesley students come from the 11 local school districts and 4 public school academies located in Muskegon County.

24. Respondent Whitehall District Schools is a local school district within Muskegon County and is a local constituent district of Muskegon Area ISD.

25. Wesley School requires school districts to submit a referral to Wesley before an IEP team may consider Wesley School as a potential placement option for a student.

26. Respondent submitted a referral packet to Wesley School on March 1, 2017.

27. Wesley School is located approximately 14 miles from Petitioner's residence in the city of Muskegon.

28. Ealy Elementary is located approximately 5 miles from Petitioner's residence in the village of Whitehall.

FINDINGS OF FACT

Based on the entire record in this matter, including the testimony and admitted exhibits, the following findings of fact are established in addition to the stipulated facts listed above:

1. On May 3, 2016, an Individualized Education Program (IEP) Team Report was created for Student. The IEP was amended on June 3, 2016. The May 3, 2016 IEP calls for Student to be placed in the resource room program at Shoreline Elementary for between 1675 and 1795 minutes per week. The IEP calls for Student to be in the general education setting for between 30 and 150 minutes per week. The IEP calls for Student to receive consultative social work services for between 10 to 20 minutes a session, with 1 to 3 sessions per month. The IEP also calls for Student to receive direct speech and language services for 10 to 20 minutes per session, with 1 to 4 sessions per month, and for Student to receive direct occupational therapy services for 15 to 25 minutes per session, with 1 to 4 sessions per month. The IEP states that Student does not require the use of assistive technology devices, but that the team would like to "trial devices in anticipation of future needs". The IEP also calls for Student to receive adult support during all portions of the day and for Student to have access to an alternative location for the purpose of preventing distracting or concerning behavior, to provide a space to nap, and to allow for opportunities to engage in preferred activities. (Jt. Exhibit 2).

2. On April 17, 2017, an IEP Team Report was created for Student. The following individuals were present at the IEP team meeting: Jason Bogue, general education teacher; Amanda Krentz, special education provider; Marianne Bassett, speech pathologist; Dave Hundt, principal at Shoreline Elementary; Roxana Osburn, social worker, Mary Bradley, principal at Wesley School; J.B., Student's mother/Petitioner; L.B., Student's father; Mandy Thomas, director of special education; Paula Martin, OTR; Stephanie Lathrop, MAISD behavior specialist; Ron Bailey, principal at Ealy Elementary; and Kristie Spoon, paraprofessional. (Jt. Exhibit 1).

3. The April 17, 2017 IEP calls for Student to receive consultative speech and language services while at Wesley School for 10 to 20 minutes per session with 1 to 4 sessions per month. The IEP also calls for Student to receive consultative occupational therapy services while at Wesley School for 10 to 20 minutes per session with 1 to 4 sessions per month. The IEP also calls for Student to receive adult support during all portions of the day in all school settings and for school

field trips. The IEP further calls for Student to be provided with low-tech communication supports and for the staff to have access to the MAISD assistive technology consultants for the purpose of trialing devices based on Student's changing communication needs. The IEP further calls for Student to have access to an alternative location for the purpose of preventing distracting or concerning behavior, to provide a space to nap, and to allow for opportunities to engage in preferred activities. The IEP additionally calls for Student to have frequent breaks and/or removal from the classroom as well as access to alternative seating as needed for all school settings. (Jt. Exhibit 1).

4. Prior to the April 17, 2017 IEP, Respondent sent a letter dated March 17, 2017 home with Student to Petitioner. That letter informed Petitioner that at the IEP, the team would be discussing options for Student's placement, including the potential for placement at the resource room at Ealy Elementary and the potential for placement at Wesley School. (Pet. Exhibit 21, Tr. Vol. II, pages 274-275).

5. Prior to the April 17, 2017 IEP, and prior to the March 17, 2017 letter, Petitioner had expressed to staff at Respondent District that she did not want Student placed at Wesley. (Tr. Vol. II, pages 271-273).

6. Petitioner and her husband, Student's father, attended the April 17, 2017 IEP team meeting.

7. Student's father prepared a written statement that was handed out and read aloud during the April 17, 2017 IEP team meeting. A copy of that statement was attached to the completed IEP. (Jt. Exhibit 1).

8. Prior to the end of the April 17, 2017 IEP team meeting, Petitioner and Student's father stated that the meeting was adjourned and then left the meeting. The meeting proceeded after Petitioner and Student's father left and Student's April 17, 2017 IEP was finalized. (Tr. Vol. II, pages 285-287, Tr. Vol. I, pages 221-222).

9. The bus ride for students from Whitehall to Wesley School ranges in time from 25 minutes to an hour and a half. (Tr. Vol. I page 207).

10. There are no general education students who attend Wesley School.

11. Student had a behavior plan during the 2015-2016 school year. (Tr. Vol. IV, pages 701-702, Jt. Exhibit 3).

12. By the end of the 2015-2016 school year, Student's behaviors had decreased such that the IEP team no longer felt that a behavior plan was necessary. A

behavior plan was not created or in place for Student for the 2016-2017 school year. (Tr. Vol. I, pages 154-156).

13. Respondent created a diapering protocol for Student. The protocol contemplates three people assisting with diapering Student. (Resp. Exhibit H).

14. Ms. Louise Crough, Student's at-home aide, testified that she diapers Student by herself, and that she occasionally has assistance from a second person. (Tr. Vol. II, pages 266-267).

15. Kristie Spoon, Student's paraprofessional during the 2016-2017 school year, testified that multiple people were required to assist in diapering Student. (Tr. Vol. III, pages 51-513).

16. Amanda Krentz, Student's special education teacher during the 2016-2017 school year testified that three people are required to diaper Student. (Tr. Vol. I, pages 127-129).

17. There is an intensive resource room program at Ealy Elementary. (Tr. Vol. II, page 405).

DISCUSSION

In the instant matter, like in most due process hearings, a number of witnesses testified and there were numerous exhibits offered and admitted into evidence. Post-hearing briefs and reply briefs were submitted by both parties. I have reviewed and considered the exhibits, the transcripts of the hearing, and the briefs submitted by the parties in making a determination in this matter.

As there are multiple issues presented for hearing, I will address each issue individually below.

Did Respondent commit procedural violations of the IDEA regarding the April 17, 2017 IEP by predetermining the IEP prior to the meeting?

Petitioner asserts that Respondent predetermined the outcome of the April 17, 2017 IEP team meeting and therefore committed a procedural violation of the IDEA. Petitioner asserts that Respondent did not consider the input of the parents and had already made the decision as to Student's placement prior to the start of the meeting. In support of her position, Petitioner points to the communications between individuals at Respondent District and individuals at Wesley School prior to the April 17, 2017 IEP team meeting. Petitioner also asserts that Respondent was collecting data on Student to support its alleged predetermined decision to place Student at Wesley school. Furthermore,

Petitioner contends that Respondent beginning the referral process to Wesley School prior to the April 17, 2017 IEP team meeting shows that Respondent had already decided to place Student at Wesley.

Districts must give parents an opportunity to meaningfully participate in the IEP meetings and districts must avoid predetermination of the child's educational program, *Deal, supra.* I do not find that Petitioner has shown, by a preponderance of the evidence, that Respondent violated the procedural requirements of the IDEA by predetermining the outcome of the April 17, 2017 IEP team meeting. I am not persuaded by Petitioner's argument that the collection of data for Student shows that Respondent had already decided to place Student at Wesley School and was attempting to justify this placement. Data is consistently used to adjust and improve the provision of educational services for all types of students, not only students in special education, but students in general education as well. Nowhere in the evidence admitted at hearing is there an indication that Respondent was collecting data to justify a change in placement. The idea that the mere fact that data was being collected for Student shows that the IEP was predetermined is a dangerous proposition. How would a school be able to properly collect data that is used to adjust educational programs and determine what is and what is not working if the mere collection of such amounted to an inference of predetermination? In this sense, Petitioner's argument must fail.

Petitioner correctly asserts that staff at Respondent District made a referral to Wesley School regarding the possibility of selecting Wesley as a programing option for Student. On March 1, 2017, a referral packet was submitted to Wesley School pertaining to Student. Additionally, Mandy Thomas contacted Mary Bradley in October of 2016 about the possibility of having Student attend Wesley (Tr. Vol. I, page 194). Ms. Bradley testified that when a student is referred to Wesley, that referral starts with a phone call, then a pre-referral visit is done and information is gathered pertaining to the student in question. Staff from Wesley will then conduct observations of the student in question. Suggestions are then made by Wesley staff to the referring district as to what supports and services the referring district may try to assist with the education of the student in question. After these steps, a formal referral will be made to Wesley (Tr. Vol. I, pages 194-198).

The referral process by which students are referred to Wesley School is a lengthy process. Referrals are made well before a decision is made to place the student in question at Wesley. Additionally, just because a referral is made and the process commences, does not mean that the student will end up being placed at Wesley (see Tr. Vol. I, pages 209-210). In fact, Ms. Bradley credibly testified that not all students who are referred to Wesley and who have gone through the referral process are placed at Wesley. Therefore, I do not find that the referral to Wesley School prior to the April 17, 2017 IEP team meeting shows that the results of the IEP were predetermined by Respondent.

Petitioner's Exhibit 21 contains a huge amount of email communications between staff at Respondent District, Wesley School, and Petitioner. Although there are communications between the staff at Respondent district referencing the possibility of placement at Wesley School, there are no communications that state that Student will be attending Wesley School prior to the April 17, 2017 IEP team meeting. As stated above, communication between a referring district and Wesley school does not necessarily mean that the student in question will be placed at Wesley. Communication is necessary to complete the referral process and to determine if Wesley is even appropriate to be considered as a placement option. Furthermore, even if Wesley is considered to be appropriate to consider as a placement option, Wesley still may not ultimately be selected as a placement option based on the outcome of the IEP.

Additionally, I do find that Petitioner and Student's father were given an opportunity to meaningfully participate in the IEP process. They attended the April 17, 2017 IEP team meeting as per their invitation, were involved in the discussions that took place at the meeting and provided a written statement which was attached to the completed IEP. Petitioner and Student's father left before the April 17, 2017 IEP was completed. The evidence shows that they attended for the majority of the meeting, but when the topic of placement was being discussed, the meeting became contentious. They exclaimed that the IEP "was adjourned" and abruptly left the meeting without any further discussion. The evidence does not show that anyone but Petitioner and her husband agreed to or thought that the meeting was adjourned. The meeting continued after they left. Even though the meeting proceeded subsequent to Petitioner and Student's father leaving, I do find that Petitioner and Student's father were given the opportunity to meaningfully participate and to express their thoughts and concerns pertaining to Student's education. To hold otherwise would allow any parent disagreeing with an IEP to simply leave the meeting and claim a due process violation.

In summation, I do not find that Petitioner has shown, by a preponderance of the evidence, that Respondent violated the procedural requirement of the IDEA. I do not find that Petitioner has shown by a preponderance of the evidence that she and Student's father were denied the opportunity to meaningfully participate in the IEP process or that the outcome of the April 17, 2017 IEP was predetermined prior to the meeting.

Does the April 17, 2017 IEP operate to provide Student with a free and appropriate public education (FAPE) in the least restrictive environment (LRE)?

The placement at Wesley School is a more restrictive placement for Student than placement at Ealy Elementary at Whitehall District Schools according to the continuum of placement (see 34 CFR 300.115 and 34 CFR 300.38). However, it has been held that placement of a student in the LRE is not always appropriate depending on the circumstances of the particular case. In *Clyde K. v. Puyallup School District*, 21 IDELR

664 (9th Cir. 1994) the court held that placement of a student in a regular education classroom (or the LRE) is not required where a student poses a threat to the safety of either themselves or other students. Additionally, in *Renollett v. Independent School District No. 11, Anoka-Hennepin*, 45 IDELR 117 (8th Cir. 2006) the court held that placement in a regular education classroom is not appropriate where the student engages in significantly disruptive behavior that interferes with the education of the student's classmates.

34 CFR 300.116 speaks to the LRE requirement of the IDEA. It states as follows:

> In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that—
>
> (a) The placement decision—
> (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and
> (2) Is made in conformity with the LRE provisions of this subpart, including §300.114 through 300.118;
>
> (b) The child's placement—
> (1) Is determined at least annually;
> (2) Is based on the child's IEP; and
> (3) Is as close as possible to the child's home;
>
> (c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;
>
> (d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and
>
> (e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

Therefore, the IDEA clearly states that modifications to the curriculum are not an appropriate reason to place a student in a more restrictive environment. However, the

LRE requirement does not supersede the requirement for a district to provide a FAPE to a student, *P. v. Newington Bd. of Educ.*, 51 IDELR 2 (2d Cir. 2008). If it is necessary for a student to be placed in a more restrictive environment in order to receive a FAPE, then such a placement is permitted by the IDEA.

In the instant case, Respondent claims that placement of Student at Wesley School is necessary for her to receive a FAPE. Student presents with a very unique situation. It is uncontroverted that the nature of Student's disability means that she will regress physically and intellectually. Therefore, the definition of "progress" for Student is not what one would use to describe other students with non-regressive disabilities. The nature of Student's disability means that she will not progress through the curriculum, she will not advance in terms of the curriculum and will not continuously build her intellectual and physical capabilities. In fact, the evidence shows that Student will continue to regress and lose intellectual and physical capabilities as she ages and her disease progresses. The evidence shows that the best way to approach Student's education is through maintenance; attempting to slow the loss of her intellectual and physical skills and maintain her current level of functioning. However, the evidence shows that even this endeavor will ultimately fail. Yet regardless of the tragic circumstances and future for Student, Respondent is still required to provide a FAPE in the LRE. Based on the ruling in *Endrew F., supra.*, Respondent is therefore required to provide an educational program that allows Student to make progress appropriate in light of the circumstances.

Therefore, in light of Student's unique circumstances, progress, for Student, will be a maintenance plan which will hopefully act to maintain Student's current levels while her disease progresses. Respondent asserts that the curriculum focused on at Wesley School (the essential elements curriculum as opposed to the common core curriculum) is best suited to meet Student's needs and allow her to progress. The essential elements curriculum is a more basic curriculum which focuses more on the building block, essential elements of life and what students with disabilities would be focusing on learning, as opposed to the common core curriculum, which is what general education students would be focused on. Students at Wesley generally follow the essential elements curriculum (Tr. Vol. IV, pages 670-671.).

Amanda Thomas testified that she felt that placement for Student at the Wesley School was more appropriate than the placement at the intensive resource room at Ealy Elementary because of the curriculum and instruction offered at Wesley. She testified that the programing, curriculum and instruction at Wesley are more appropriate for Student given Student's current level (Tr. Vol. II, pages 404-406).

However, as stated directly in 34 CFR 300.116, curriculum in and of itself and the need to modify such, is not reason enough to move a student to a more restrictive environment. Therefore, just because Wesley School focuses more on the curriculum

which is more appropriate for Student in light of her circumstances, does not mean that it is appropriate to move Student to such a restrictive environment so that she can receive said curriculum. The curriculum can be modified in a less restrictive environment in order to give Student the opportunity to progress in light of her circumstances.

There was no medical evidence submitted which shows that Student being placed at Wesley School is necessary for medical reasons. The evidence shows that there are nurses on staff at Wesley, however, no medical evidence was submitted to show that having such personnel on hand is medically necessary for Student.

Additionally, I do find that the extended bus ride would pose a problem for Student and would not be outweighed by the potential benefits of Student attending Wesley School. Although it is unclear as to what the exact length of the bus ride would be, the evidence shows that the ride could be as long as 90 minutes. This factor must be taken into consideration when determining the appropriateness of the placement proposed by the April 17, 2017 IEP.

During the 2014-2015 and 2015-2016 school years, Student had serious behavioral difficulties that required a Behavior Intervention Plan (BIP). However at the beginning of the 2016-2017 school year, Student's behaviors had decreased to such an extent that a BIP was no longer warranted (see Tr. Vol. I, pages 153-158). The May 3, 2016 IEP does not contain a behavior plan for Student, nor does the April 17, 2017 IEP. If Student's behaviors had decreased to the extent that no behavior plan was needed, I cannot find that Student's behaviors justify a placement in a more restrictive environment. In as much as Respondent contends that Student's behaviors justify placement in a more restrictive environment, Respondent must first utilize a behavior plan in a less restrictive environment in an attempt to control said behaviors. Accordingly, it does not follow to assert that Student's behaviors are so extreme that it justifies a placement in a more restrictive environment while at the same time stating that Student's behaviors have declined to the point that no behavior plan is necessary for Student in a less restrictive placement.

It seems, based on the evidence submitted, that the justification for placing Student in the more restrictive environment of Wesley School is the programing offered by Wesley. The testimony was that the programing offered at Wesley is more suited for Student given her needs and the state of her disability. The testimony was that the programing at Wesley centers around teaching the curriculum of essential elements and that Student would have more exposure to peers based on the number of students who would be working on the same curriculum. However, Student would only have access to disabled peers at Wesley, where at Ealy she would have access to peers across the spectrum of abilities. I do not find that these reasons justify placing Student at Wesley school, in opposition to the LRE requirement of the IDEA. I do not find that the

evidence shows that Student would be unable to make progress in light of her circumstances in a less restrictive environment (Ealy Elementary) with the appropriate supports and services. Therefore, I do find that the placement of Student at Wesley School does not offer her a FAPE in the LRE.

CONCLUSIONS OF LAW

1. Petitioner did not establish, by a preponderance of the evidence, that Respondent committed procedural violations of the IDEA regarding the April 17, 2017 IEP.

2. Petitioner did establish, by a preponderance of the evidence, that the placement contemplated under the April 17, 2017 IEP (Wesley School) fails to provide Student a FAPE in the least restrictive environment.

ORDER

NOW, THEREFORE, IT IS ORDERED:

1. Petitioner's complaint is denied in part and granted in part.

2. Within 30 days of the date of this order, Respondent shall convene an IEP team meeting wherein a new IEP shall be drafted for Student which places her at Ealy Elementary. The IEP team shall formulate the IEP to have appropriate services for Student in light of her placement at Ealy Elementary. Respondent will specifically consider physical therapy services, occupational therapy services, and assistive technology which may be appropriate for Student. Student shall be provided a one to one aide.

3. Respondent shall provide proof of compliance with each portion of this order within 30 days to the Michigan Department of Education.

IT IS FURTHER ORDERED that any claims or defenses not specifically addressed herein are dismissed with prejudice.

A party aggrieved by this decision may seek judicial review by filing an action in a court of competent jurisdiction within 90 days of the date of this order.

Christopher S. Saunders
Administrative Law Judge

PROOF OF SERVICE

I hereby state, to the best of my knowledge, information and belief, that a copy of the foregoing document was served upon all parties and/or attorneys of record in this matter by Inter-Departmental mail to those parties employed by the State of Michigan and by UPS/Next Day Air, facsimile, and/or by mailing same to them via first class mail and/or certified mail, return receipt requested, at their respective addresses as disclosed below this 22nd day of November, 2017.

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Michigan Administrative Hearing System

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