STATE OF NORTH CAROLINA		IN THE OFFICE OF ADMINISTRATIVE HEARINGS
COUNTY OF BUNCOMBE	)	08 EDC 2971
Student, by parent	)	
or guardian *Parent*,	)	
	)	
Petitioner,	)	
	)	**RECOMMENDED DECISION**
v.	)	
	)	
BUNCOMBE COUNTY SCHOOL	)	
DISTRICT BOARD OF EDUCATION,	)	
	)	
Respondent.	)	

This matter came before the Undersigned for hearing on May 13-14, 2009 and June 2223, 2009 in Asheville, NC. Oral and documentary evidence were received during the hearing. Based on the evidence submitted at the hearing, the Undersigned enters the following Decision:

APPEARANCES

For the Petitioner, Student, by and through her parent, Parent appeared *pro se.*

For the Respondent, the Buncombe County Board of Education:
Campbell Shatley, PLLC
K. Dean Shatley, H
674 Merrimon Avenue, Suite 210
Asheville, NC 28804

APPLICABLE LAW

North Carolina Administrative Procedures Act ("APA"), N.C. Gen. Stat. Chapter 150B

N.C. Gen. Stat. Chapter 115C, Article 9 "Education of Children with Disabilities"
Individuals with Disabilities Improvement Act (IDEA 2004), 20 U.S.C. § 1400 *et. seq.*

North Carolina Policies and Procedures Governing Services for Children with Disabilities, NC 1501-1

JURISDICTION

Student is a child with a disability and the Office of Administrative Hearings has jurisdiction over this matter pursuant to NC 1504-1 of the *North Carolina Policies and Procedures Governing Services for Children with Disabilities'.* Neither party objected to this court's jurisdiction during the hearing.

PROCEDURAL BACKGROUND

Parent, on behalf of her child *Student*, filed her Petition for Due Process with the Office of Administrative Hearings on November 26, 2008. Shortly thereafter, the Respondent filed an Objection to the Sufficiency of the Petition. In an order dated December 11, 2008, Administrative Law Judge Augustus B. Elkins ordered that the Petition was insufficient and granted *Parent* additional time to file an amended Petition which was filed on January 26, 2009. In his pre-hearing Order dated March 3, 2009, Judge Elkins narrowed the issues for the administrative hearing to the following: *identification, evaluation, and placement.*

ISSUES

Based on the amended Petition and on Judge Elkins's pre-hearing Order, there are three issues before the Court:

1. Has *Student* been provided an appropriate identification as a student with "Multiple Disabilities" pursuant to NC 1500-2.4(b)(8) and NC 1503-2.5?

2. Has the Respondent failed to appropriately provide an evaluation for *Student* pursuant to NC 1503-2.4?

3. Has the Respondent provided an appropriate placement for *Student* in accordance with NC 1501-1 and NC 1501-3.1?

EVIDENCE PRESENTED AT HEARING

Testimonial evidence:

Witnesses for the Petitioner:

1. S.P.
2. P.S.
3. J.R.
4. *Father*
5. J.M.
6. *Parent*

Witnesses by the Respondent:

1. N.M.
2. J.B.

Based on a request from the Undersigned and with the agreement of both parties, the Respondent presented two witnesses prior to the close of Petitioner's evidence for the convenience and efficiency of the hearing. The Petitioner had the opportunity to thoroughly cross-examine both of the Respondent's witnesses.

' The *North Carolina Policies and Procedures Governing Services for Children with Disabilities* will be cited as NC 1500-I. The Policies and Procedure manual was adopted by the North Carolina Department of Public Instruction and State Board of Education pursuant to authority granted by Part B of the Individuals with Disabilities Education Act 20 U.S.C. 1400 and 34 C.F.R. 300.1

Documentary evidence:

Petitioner's Exhibits 1 through 52 were admitted. Petitioner's Exhibits 27, 28, 29, 30 and 32 were produced for the first time at the hearing on May 14, 2009.

Respondent's Exhibits 1 through 12 were admitted.

FINDINGS OF FACT

1. *Student* is currently an eight-year-old student at *W* Elementary School located in Buncombe County, North Carolina.

2. *Student* is considered a student with a disability pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. 1400 and Article 9 of N.C.G.S. § 115C. (5/14, *Parent* p. 220).

3. The Buncombe County Board of Education (the "Board") is the local education agency (LEA) that operates *W* Elementary School.

4. *Student* is a non-verbal student with multiple and severe disabilities including: cerebral palsy, ***, ***, ***, speech delay, global delay, mental retardation. (P. Ex. 13; P. Ex. 27; R. Ex. 8)[2].

5. Because *Student* is considered a student with a disability under IDEA, the Board has provided her with an Individualized Education Plan, also known as an IEP.

6. In October 2008, *Student*'s IEP team was scheduled to meet for an annual review of the IEP.

7. The October meeting was approximately three hours long and the team was unable to complete the required annual review.

8. Another meeting was scheduled for November 24, 2008. The participants of the November 24 meeting were *Parent*; *Father*; J.R., parent advocate; B.W., principal; Jana Griggs, Director of the Respondent's Exceptional Children's program; P.W., special education teacher; and J.B., regular education teacher. (R. Ex. 1).

9. At this meeting, the LEA presented an IEP that would change *Student*'s placement from a primarily regular education setting to a separate setting which has a specialized classroom for students with multiple and/or severe disabilities.

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[2] Petitioner's exhibits are cited as (P. Ex.) and Respondent's exhibits are cited as (R. Ex.). References to testimony are cited as to clarify the day of the hearing, the witness, and the page number of the transcript in which the testimony is found. For example (5/13, N.M. pp. 102-3) would indicate a reference to N.M.'s testimony on the first day of hearing (May 13) found on pages 102 and 103 of the transcript.

10. During the November meeting, *Parent* indicated to the other members of the IEP team that she was going to file for due process. After this statement, *Parent* refused to participate in the meeting although she was asked to provide input by school officials. (5/14, Rice, pp. 8990, 114-5; *Father* p. 182.)

11. *Parent* filed a Petition for Due Process on behalf of *Student*

12. As stated above, there are three issues before the court: identification, evaluation and placement. Each of these will be addressed separately.

13. At the hearing, Petitioner offered several witnesses who were familiar with *Student*, including herself, *Student*'s father, and three one-on-one aides who provide care for *Student* in the home. *Parent* also called J.R. to testify. J.R. is a parent advocate who volunteers his time to assist families of disabled children.

14. While Petitioner's witnesses care deeply about *Student* and provided a very good general knowledge of *Student*, none of the witnesses testified to being familiar with *Student*'s progress in her second grade classroom. Furthermore, none of them provided any testimony or evidence as to the Respondent's suggested identification, evaluation or placement of *Student*

15. *Parent* offered no expert witnesses.

16. The Respondent offered two witnesses: Mrs. N.M., a program and placement specialist with the LEA, and Mrs. J.B., *Student*'s regular education classroom teacher. Both of these witnesses are employed by Respondent.

Identification

The primary issue surrounding identification is whether or not *Student* should be classified within the category of "Multiple Disabilities."

1. "Multiple Disabilities" is a special education category defined as "two or more disabilities occurring together (such as intellectual disability-blindness, intellectual disability-orthopedic impairment, etc.), the combination of which causes such severe educational needs that they cannot be accommodated in special education programs solely for one of the impairments." N.C. 1500-2.4(b)(8). The special education category(ies) applicable to a child is(are) listed on page one of the child's IEP as primary or secondary areas of eligibility. A summary of a child's assessment information and review of progress is also included. See e.g. R. Ex. 1, p.1.

2. Prior to recent changes in the North Carolina *Policies and Procedures Governing Services for Children with Disabilities*, the "Multiple Disabilities" category was known as "Multi-Handicapped." (5/13, Testimony of N.M., pp. 51-2, 94-5.) Students originally identified as "multi-handicapped" are now identified as having "Multiple Disabilities." (5/13, N.M., pp. 99-100.)

3. Originally, *Student* was classified as "multi-handicapped." This classification was transferred to "Multiple Disabilities" sometime in the last year. During her direct testimony, *Parent* stated that she is now in agreement with *Student*'s classification of "Multiple Disabilities." (5/14, *Parent* p. 220; 6/22, *Parent* pp. 134, 177.)

Evaluation

1. Prior to a child entering a school's exceptional children's (EC) program, the child must receive a full and individualized evaluation. N.C. 1500-2.11. According to policy and procedure 2.11, "Evaluation procedures may include, but are not limited to, observations, interviews, behavior checklists, structured interactions, play assessment, adaptive and developmental scales, criterion-referenced and norm referenced instruments, clinical judgment, and tests of basic concepts or other techniques and procedures as deemed appropriate by the professional(s) conducting the evaluations."

2. Once a full and individualized evaluation is complete, the student's IEP team uses the evaluation to determine whether a child is eligible for the exceptional children's program. If a child is eligible, the IEP team also uses the evaluation results as a tool to help develop an IEP.

3. Every three years, a student's IEP Team must consider whether or not to conduct a re-evaluation and in most instances, unless school officials and the parent agree otherwise, a student in the EC program should receive a re-evaluation.

4. *Student*'s initial evaluation occurred prior to her third birthday. (5/13, N.M. pp.55-6.) This evaluation, conducted by D.G., indicated that *Student* yielded a mental development index score of less than 50, which placed her in the 0.1 percentile of children her age at the time the evaluation was administered. (5/13, N.M. p. 60; R. Ex. 8).

5. In October 2006, while *Student* was in first grade, her IEP Team considered whether or not to conduct a re-evaluation. At that time, the IEP Team, including *Parent*, chose not to seek a re-evaluation; rather the team continued to use information already obtained by school officials. In making this decision, the IEP Team considered a review of *Student*'s record, previous evaluation results, information provided by the parent and information provided by the school staff. Based on this decision, the appropriate re-evaluation determination report was signed by members of the IEP Team, including *Parent* (P. Ex. 10; 5/13, N.M., pp. 105-7, 110-11.)

6. In September 2008, while *Student* was in third grade, the IEP Team agreed that an evaluation would be appropriate. *Parent* signed the necessary consent forms, thereby allowing the school to perform the evaluation.

7. Based on *Student*'s multiple and severe disabilities, the Respondent offered to have an outside organization perform the evaluation, specifically the Center for Developmental Learning ("CDL") in Chapel Hill, NC. CDL specializes in the assessment of children with severe and multiple disabilities. (5/13, N.M. pp.52-3.) The evaluation with CDL was scheduled for February 2009.

8. In January 2009, shortly before the evaluation was to take place, *Parent* refused to let CDL perform the evaluation. As the parent, *Parent* has the right to refuse an evaluation.

9. After *Parent* cancelled the CDL evaluation, the Respondent requested that one of its in-house psychologists perform the evaluation. *Parent* also refused this evaluation and expressly revoked her consent to an evaluation. (5/13, N.M. pp. 54-5).

10. After this second refusal, the Respondent again offered another outside agency to perform the evaluation, specifically Dr. Barrie Morganstein of Southeast Psychological Services, PLLC, located in Charlotte, NC. (5/13, N.M. p. 55; 6/22, *Parent* pp. 159-61).

11. *Parent* was encouraged to contact Dr. Morgenstein to address any concerns. *Parent* has not provided the respondent the consent necessary to perform the evaluation. (5/14, *Parent* pp. 299-300; 6/22, *Parent* pp. 158-62).

12. *Parent* expressed concerns that past evaluations are not accurate because of evaluators' comments within their reports related to the challenges *Student*'s disabilities pose for assessment and evaluation, and the limitations of assessment and evaluation tools. (6/22, *Parent* pp. 251-253) *Parent* also has concerns that evaluations will not be "impartial" if Respondent pays for them. (6/22, *Parent* p. 162)

13. The Respondent has clearly offered *Parent* three different opportunities for evaluation during the 2008-2009 school year and *Parent* has refused all three evaluations.

Placement

1. Since *Student* has been in elementary school, she only attends school for approximately four hours per day. Typically, *Student* arrives at the beginning of the school day and leaves around lunch time. This arrangement was agreed upon by the Petitioner and Respondent.

2. During Kindergarten and first grade, *Student* received a majority of her educational services in a regular education classroom with her non-disabled peers. *Student* also received some other individualized or small group services in a resource classroom with a special education teacher or an appropriate therapist. This is typically known as a "Resource" placement.

3. School employees on the IEP Team recommended that *Student* be placed in a "separate" placement during her first two years of elementary school but *Parent* adamantly disagreed with this recommendation. Based on *Parent*'s opposition to the placement, the IEP Team acquiesced and *Student* remained in a regular education classroom and received "resource" services. (5/13, N.M. pp. 192-3.)

4. During the November 2008 IEP meeting, the Respondent changed *Student*'s placement to a "separate" placement, meaning *Student* will receive a majority of her educational services in a classroom designed for students with severe disabilities.

5. Prior to the October and November meeting, the Respondent made *Parent* aware that the IEP Team would consider a change of placement. The Respondent sent *Parent* an invitation to conference on September 27, 2008, which clearly indicated that a change in placement would be discussed at the meeting. (P. Ex. 6.)

6. At the filing of the Petition, *Student* remained in her regular education placement pursuant to N.C. 1504-1.19.

7. Ms. S.P., a paraprofessional and *Student*'s one-on-one aide, testified that Student is capable of basic addition and word recognition, but could not provide any written data to support her contentions. (5/13, S.P., pp.224-6, 257-8.) Ms. S.P. did not offer any evidence that a separate classroom placement would be an inappropriate setting for *Student*

8. Ms. P.S., a former one-on-one aide for *Student*, testified that based on her observations, *Student* interacted well with non-disabled peers in a regular education classroom. P.S. did not offer any other evidence or reasoning as to why a separate class placement would be a denial of FAPE or be too restrictive of an environment for *Student*

9. The separate placement designated by the IEP Team in November provides *Student* opportunities to interact with her non-disabled peers. (5/13, N.M. pp. 51).

10. *Parent*'s advocate, Mr. J.R. testified at the hearing. Mr. J.R. had no first-hand knowledge of *Student*'s ability or progress she made in her current placement and he did not provide any relevant evidence as to why the Respondent's proposed placement is not appropriate.

11. *Father*, *Student*'s father, testified. *Father* expressed general frustration with the IEP team, the belief that *Student*'s parents' input in the IEP process was not valued, and feelings related to poor communication between the IEP team and the school with *Student*'s parents. Although *Father* testified that he thought the IEP goals were "limited," he offered no evidence that her placement was inappropriate.

12. *Parent* also provided her own testimony at the hearing. *Parent* admitted that *Student*'s regular education setting is not working. (6/22. *Parent* pp. 79-80). *Parent* stated that she believed the best setting would be an inclusion setting where there is co-teaching and supports in the regular education classroom. *Parent* also testified that she believes a "separate placement" is an "artificial environment" and against the "natural environment." (6/22, *Parent* pp. 228-30). *Parent* did agree with the Respondent that *Student* needed instructors with specialized training;

she did not agree with the Respondent, however, on the environment in which the instruction should occur. (6/22, *Parent* p. 231).

13. J.M., a paraprofessional and *Student*'s one-on-one aide, testified extensively on working with *Student* on field trips and in the home. She presented no evidence as to the Respondent's proposed placement for *Student*

14. It is apparent that all of *Parent*'s witnesses care very deeply for *Student* and only want the best for this student. During the hearing, however, these witnesses offered little to no significant evidence that the Respondent's proposed placement would not provide a Free and Appropriate Public Education or that it is not the Least Restrictive Environment for *Student.*

15. The Respondent provided two witnesses that provided professional opinions on why *Student* should be educated in a separate placement, Mrs. N.M. and Mrs. J.B. Mrs. N.M. and Mrs. J.B., both employees of the Respondent, testified that the best placement for *Student* is a separate classroom setting with teachers specially trained to work with disabled students. (5/13, N.M. pp. 47, 69, 191-3; 6/22, J.B. pp. 300-3).

16. N.M., a program and placement specialist for the Respondent with over thirty-seven years of education experience, testified about her experiences with *Student* (5/13, N.M., pp. 31-2.) Mrs. N.M. manages *Student*'s special education case file and is readily familiar with *Student*'s progress through elementary school.

17. Mrs. N.M. testified that in her professional opinion and based on *Student*'s multiple and severe disabilities, *Student* needs "a small group setting with fewer distractions" and that she needs "to have trained people who can work with her on developing, not only prerequisite academic skills . . . but also to develop a communication system that will really tell us what she knows and what she is thinking." (5/13, N.M. pp. 47-8, 192-3).

18. Mrs. N.M. also testified that based on her observations of *Student* over the past several years, *Student* performs better in a smaller special education classroom and is more attentive in a small group setting. (5/13, N.M. pp. 48-9.)

19. A "separate" placement would provide a smaller group setting with a lower teacher to student ratio.

20. Mrs. N.M. also provided her professional opinion that *Student* is not at grade level with her non-disabled peers. (5/13, N.M. pp. 35-6.)

21. I find Mrs. N.M. to be a truthful witness and based on her professional experiences and expertise, I find her opinions about *Student* to be reliable.

22. J.B. is *Student*'s second grade teacher. Mrs. J.B. has taught for seventeen years, has obtained her national board-certification in elementary education and holds a master degree in education. (6/22, J.B., pp. 289-92.) As *Student*'s teacher, Mrs. J.B. is very familiar with B.D's academic and communication abilities.

23. It was apparent from Mrs. J.B.'s testimony that *Student* has been unable to learn the basic skills taught in second grade. Mrs. J.B. also opined that the best placement for *Student* was a special education classroom with specially trained teachers. Based on her professional expertise

and observations, Mrs. J.B. indicted that *Student* is on a completely different academic and cognitive level than her non-disabled peers. (6/22, J.B., pp. 300-2, 312-3, 319-320.)

24. I find the testimony and evidence presented by Mrs. J.B. to be truthful and I find, based on her professional experience and expertise, that her opinions are reliable.

25. Furthermore, it is apparent from *Student*'s evaluation from 2003 and a later evaluation conducted in 2007 by Dr. Voytek **(P.** Ex. 27) that *Student*'s severe and multiple disabilities will prevent her from learning at grade level. *Parent* agreed with this fact during her testimony. (5/14, *Parent* p. 222-3; 6/22, *Parent* p. 214).

CONCLUSIONS OF LAW

Therefore, based on the above findings of fact, I make the following conclusions:

1. *Student* is a student with a disability and is entitled to the due process protections of the Individuals with Disabilities Education Act, codified at 29 U.S.C. 1400 and Article 9'of N.C.G.S. ch. 115C.

2. In *Schaffer v. Weast,* 546 U.S. 49 (2005), the United States Supreme Court ruled that the burden of proof in a special education administrative proceeding falls upon the challenging or petitioning party. Therefore, it is up to the Petitioner to present evidence that the Respondent's proposed placement, evaluation and/or identification does not provide *Student* with a *Free and Appropriate Public Education.*

3. The Respondent Board of Education has appropriately identified *Student* as a student with "Multiple Disabilities" as set forth in the *North Carolina Policies and Procedures Governing Services for Children with Disabilities,* NC 1500-2.4(b)(8).

4. The Respondent Board of Education is required to provide for an evaluation of *Student* at public expense and the Respondent has adequately attempted to evaluate *Student* during the 2008-2009 school year pursuant to *North Carolina Policies and Procedures Governing Services for Children with Disabilities,* NC 1503-2.4. The Respondent Board cannot be held responsible for failure to evaluate *Student* when *Student*'s mother refused evaluations by three different licensed psychologists or agencies.

5. Parents do not have a right to compel a school district to provide a specific program or employ a specific methodology in educating a student. *Bd. Of Educ. v. Rowley,* 458 U.S. 176, 199 (1982); *Greenwood v. Wissahickon Sch. Dist.,* 571 F. Supp.2d 654, 663 (E.D. Pa. 2008). The Respondent Board of Education is required to provide a placement for *Student* that will allow her to make adequate progress on her IEP and that is in the least restrictive environment. The Respondent has provided a placement reasonably calculated to provide educational benefits to *Student* thereby providing her a *Free and Appropriate Public Education* pursuant to I.D.E.A. and the *North Carolina Policies and Procedures Governing Services for Children with Disabilities,* NC 1501-1. As required by NC 1501-3.1, this placement is also the least restrictive environment for B.D in that the nature and severity of *Student*'s disabilities is such that educating her in a regular education classroom cannot be achieved satisfactorily, even with the use of supplementary aids.

ORDER

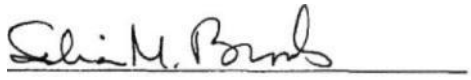
At the close of the Petitioner's evidence, the Respondent Board of Education moved for Directed Verdict pursuant to Rule 53 of the North Carolina Rules of Civil Procedure. Both parties were given the opportunity to orally address the motion.

Based on the competent evidence presented at the hearing as well as the arguments made by both parties, it is the Court's decision that the Petitioner has not met the burden of proof required by the Individuals with Disabilities Education Act in any of the three issues before this Court. **Therefore, the Motion for Directed Verdict is hereby granted in favor of Respondent.**

NOTICE

In order to appeal this Decision, the person seeking review must file a written notice of appeal with the North Carolina Superintendent of Public Instruction. The written notice of appeal must be filed within thirty (30) days after the person is served with a copy of this Decision. G.S. 115C-116(h) and (i) within thirty (30) days of receipt of this written decision.

This the 17th day of August, 2009.



The Honorable Judge Selina M. Brooks
Administrative Law Judg