

STATE OF NORTH CAROLINA BEFORE A STATE HEARING REVIEW OFFICER  
FOR THE STATE BOARD OF EDUCATION  
PURSUANT TO G.S. 115C – 109.9

██████████ "██████████"  
by and with his parents, ██████████ and ██████████  
  
Petitioners  
  
v.  
  
Winston-Salem/Forsyth County  
Board of Education  
  
Respondent

DECISION

14 EDC 06398

This is an appeal of the Decision issued by Administrative Law Judge Selina M. Brooks on February 27, 2015. Judge Brooks' hearing for this case was held on October 15, 2014 in Winston-Salem, North Carolina; on November 17 – 18 and November 20, 2014 in Thomasville, North Carolina; and on November 24, 2014 in Lexington, North Carolina. The Petitioners appealed Judge Brooks' Decision and the Review Officer was appointed on April 10, 2015. The Review was conducted pursuant to the provisions of N.C.G.S. 115C – 109.9.

The records of the case received for review were:

1. One (1) set of ALJ Records, which contained her Decision, Orders, Motions, Proposed Decision of the Respondent, Correspondence, and Miscellaneous records of the case.
2. One (1) set of Stipulated Exhibits.
3. One (1) set of Petitioners' Exhibits.
4. One (1) set of Respondent's Exhibits.
5. Five (5) numbered volumes of Transcripts.
6. Written Arguments from both parties.

Appearances:

For Petitioners: Karen Vaughn and Kelli Espaillat; K<sup>2</sup> Legal Services, 125 E. Plaza Drive, Suite 118, Mooresville, North Carolina 28115

For Respondent: Carolyn Waller and Benita N. Jones; Tharrington Smith LLP, Post Office Box 1151, Raleigh, North Carolina 27602-1151

The Petitioner, "██████████ ██████████" who was age 18 at the time of the hearing, requested an open public hearing and waived privacy rights. This document, therefore, includes personally identifiable information. For convenience, the following will be used in this Decision to refer to the parties:

For the Student/Petitioner - Petitioner; ██████████ the student  
For Parents/Petitioners - Petitioners; ██████████ (mother); ██████████ (father); parents  
For Respondent – Respondent; Winston-Salem/Forsyth Schools; District; LEA

## WITNESSES

For Petitioners:

█ Petitioner  
Doreen Hughes, MD  
Rebecca Felton, PhD  
Sam Dempsey  
Carol Fish  
Patricia Collins, PhD  
Frank Balch Wood, PhD  
█ Petitioner  
Kevin Pendergast

For Respondent:

None

## EXHIBITS

The following exhibits were received into evidence:

Joint/Stipulated Exhibits: 1 – 30  
Petitioners' Exhibits: 2, 6, 7, 8, 10, 17, 19, 33, 34, 36, 38, 47  
Respondent's Exhibits: 1, 2, 3, 4, 5, 8, 9, 10, 11, 12

## STIPULATIONS

The parties proposed a Pre-Trial Order, which was filed on October 15, 2014 and approved by the ALJ. The parties stipulated to the following facts:

1. █ has not attended a WSF school since the 2010-2011 school year. █ last attended a school within the District in June 2011. In July 2011, █ and █ rejected an IEP developed in July 2011 that proposed █ placement at █ School in the District and first placed him at a private school in Winston-Salem then subsequently at The █ School █ a residential boarding school in up-state New York. █ is a fourth-year high school student currently attending █ Of his thirteen years of formal education, only four have been spent in a District school.
2. When █ last attended a school within the district, █ was classified as a child with a disability for the purpose of IDEA, 20 U.S.C. §1400 et seq. and a child with special needs within the meaning of N.C. Gen. Stat. 115C, Article 9. Being then domiciled in Forsyth County, he was entitled to a free appropriate public education (FAPE) from the Respondent.
3. █ is currently 18 years old and has reached the age of majority. Pursuant to NC 1504-1.12, all rights accorded to █ parents █ and █ under Part B of the IDEA transfer to █

4. The parties entered into a Settlement Agreement and Consent Order filed with the Office of Administrative Hearings on October 1, 2012, which released the District from all claims “arising out of or on account of the matters alleged in (or which could have been alleged in) or relating to” the petitions filed at OAH Docket No. 11 EDC 11823 and OAH Docket No. 11 EDC 06068.
5. IEP meetings were held on August 23, 2013 and September 25, 2013 to develop an IEP for [REDACTED]

In an Addendum to the Pre-Trial Order entered on October 15, 2014 the parties stipulated to jurisdictional, party and legal matters. They also stipulated on a list of joint exhibits as well as witness lists. Another Addendum to the Pre-Trial Order was entered on November 7, 2014. It contained stipulations regarding expert witnesses and exhibit lists.

### ISSUES

In the Pre-Trial Order, the parties jointly agreed that the issues to be decided in the case were:

1. Did the Winston-Salem/Forsyth County Board of Education offer [REDACTED] a free appropriate public education for the 2013-2014 school year?
2. If the Tribunal finds that the Board did not offer [REDACTED] a free appropriate public education for the 2013-2014 school year, do Petitioners have a legal claim for reimbursement for the private program selected for the 2013-2014 school year, and if yes, was the private program selected appropriate?
3. If the Tribunal finds that the Board did not offer [REDACTED] a free appropriate public education for the 2013-2014 school year, do Petitioners have a legal claim for reimbursement for the private program selected for the 2014-2015 school year, and if yes, was the private program selected appropriate?
4. To what reimbursement, if any, are Petitioners entitled?

Following a review of the records of the case and reading the testimony, the Review Officer agrees that these are the issues to be decided.

Both parties, during testimony, were very cognizant of these issues and restricted testimony to the actual issues. Unrelated issues were not allowed to be introduced. Both parties quickly objected if an attempt was made to enter an exhibit or elicit testimony that was not related to the agreed upon issues. This is the first case reviewed by this Review Officer where the parties remained on the issues. Both parties and the ALJ are to be commended.

#### Standard of Review by the State Review Officer

The review of this case is in accordance with the provisions of G.S. 115C-109.9 and the *Policies Governing Services for Children with Disabilities*, NC 1504-1.15. The standard of review that must be used by the Review Officer for the State Board of Education is found in *Board of Education v. Rowley*, 458 U.S. 176 (1982). The Supreme Court held that due weight shall be given to the state administrative proceedings. In *Doyle v. Arlington County School*

*Board*, 953 F.2d 100 (4th Cir. 1991), the Fourth Circuit explained *Rowley's* instruction that “due weight” be given to state administrative hearings. *Doyle* reviewed a product of Virginia's two-tiered administrative system. The court noted, “By statute and regulation the reviewing officer is required to make an independent decision . . .” *Doyle*, 953 F.2d at 104 The court held that in making an independent decision, the state's second-tier review officer must follow the “accepted norm of fact finding.”

North Carolina’s District Court Judge Osteen interpreted this requirement of *Rowley* and *Doyle*. *Wittenberg v. Winston-Salem/Forsyth County Board of Education, Memorandum Opinion and Order* 1:05CV818 (M.D.N.C. November 18, 2008) A State Review Officer (SRO) must follow the same requirements as the courts. The SRO must consider the findings of the ALJ as to be *prima facie* correct if they were regularly made. An ALJ's findings are regularly made if they “follow the accepted norm of fact-finding process designed to discover the truth.”

The Review Officer finds that the ALJ's Facts were regularly made, and incorporates them into this Decision without restating them.

Several facts omitted by the ALJ, but supported by the record, have been added. These do not make any significant changes. The Review Officer has also added facts related to the review.

Having reviewed the records of the case, the Review Officer for the State Board of Education independently makes Findings of Fact and Conclusions of Law in accordance with 20 U.S.C. 1415(g); 34 CFR §300.514; G.S. 115C-109.9; and the *Policies Governing Services for Children with Disabilities*, NC 1504-1.15. To the extent that 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.

The Review Officer makes the following:

## FINDINGS OF FACT

The Review Officer finds that there is no disagreement with the Facts in the ALJ’s Decision and incorporates them into this Decision without restating them.

The Review Officer finds that the following Facts are supported by the record and are added to those of the ALJ:

### **The August IEP Meeting and the Proposed IEP**

1. The Petitioners contended throughout the hearing that residential placement was not discussed. The record is clear that it was discussed and eliminated as a possible placement on the continuum of available placements. The IEP’s of August 23, 2013 and September 25, 2013 specifically note this. (Stipulated Ex. 2 and 4)
2. The Petitioners had an opportunity to use their expert, Dr. Felton, to review and provide feedback to improve the August 23, 2013 IEP. Dr. Felton was involved with the Petitioners

at that time but was not even given a copy of the draft IEP before the meeting or the completed IEP after the meeting. (Tr. Vol. II p 423)

3. The Petitioners sole purpose of going through the exercise of having the IEP meetings and IEP development was to secure payment for their unilateral private placement at [REDACTED]. This is supported by what was told to Dr. Hughes. (Resp. Ex 5; Tr. Vol. 1, pp. 201-02)

### **[REDACTED] Anxiety and Dr. Hughes' Testimony**

4. In the week following the August IEP meeting, Petitioner [REDACTED] clearly knew that she had to act to have an opportunity to get reimbursement for the unilateral private placement. She was aware of the rule that required the Petitioners to refuse the IEP and notify the Respondent ten-days prior to enrolling [REDACTED] in the private school. The Petitioners had not refused the IEP not had they made any notification. [REDACTED] in an e-mail to Dr. Wood on August 26, 2013 mentioned a strategy to avoid the ten-day requirement. She would refuse the IEP and use [REDACTED] anxiety as an exception to the ten-day requirement. (Resp. Ex 8; Tr. Vol. 1, p. 221)
5. [REDACTED] had a history of anxiety at the beginning of each school year and had been experiencing anxiety in school situations. (Tr. Vol. II, pp. 299, 301) According to Dr. Hughes, [REDACTED] has always been able to work through his anxiety and continue in the educational program where he is enrolled, even though school is stressful for him. (Tr. Vol. II pp. 308, 310) Neither Dr. Hughes nor Dr. Wood recommended that [REDACTED] not attend Mount Tabor School because of his anxiety. (Tr. Vol. II, pp. 308-11; Vol. IV, p. 907)
6. Dr. Hughes diagnosed [REDACTED] as having an adjustment disorder with anxiety on August 30, 2013. It is triggered in certain situations, but the symptoms are temporary. (Tr. Vol. II pp. 304, 316) [REDACTED] can be described as anxious and can have meltdowns if things do not go his way. (Tr. Vol. II p. 301) [REDACTED] has also had meltdowns at [REDACTED] School. (Tr. Vol. II p. 302)
7. [REDACTED] has been provided the medication Wellbutrin, which is known to have a side effect of triggering anxiety. His Wellbutrin was increased in January 2013. (Tr. Vol. II pp. 299, 302)
8. Things did not go [REDACTED] way at the IEP meeting on August 23, 2013. He had a strong desire to return to [REDACTED] rather than be in the public schools operated by the Respondent.

### **Facts related to Petitioners' Written Argument on Appeal (Several Arguments are not even addressed, for they have no basis in fact or law.)**

9. The Petitioners contend that they did notify the Respondent that they rejected the proposed placement. They neither accepted nor rejected the IEP of August 23, 2013. There is nothing in the record until the September 25, 2013 IEP meeting that shows that the proposed placement was being rejected.
10. The Petitioners contend that the ALJ erred in concluding that the Petitioners acknowledged that the goals and methodologies in the IEP were appropriate. The record shows clearly that

the goals were never really questioned and that even the attorney for the Petitioners in final arguments stated that the goals were not an issue. The Petitioners clearly wanted the Orton-Gillingham methodology. Methodology was not in the IEP, nor is it required by IDEA to be included. The Respondent, during both IEP meetings did discuss the Orton-Gillingham based methodology that was being used by the schools.

11. The Petitioners contend that the ALJ erred in finding that the proposed placement by the Respondent was reasonably calculated to enable [REDACTED] to receive educational benefit. Their arguments in this regard were not convincing. The Petitioners had the burden to show that it did not and failed to do so.
12. In their appeal, the Petitioners contend that the proposed placement for the 2013-2014 school year was the least restrictive environment (LRE) because they allege that the Respondent only considered serving [REDACTED] at [REDACTED] School. LRE is the concept that students with disabilities are educated with their non-disabled peers to the maximum extent appropriate, and that special classes, separate schooling or other removal from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. Contrary to the Petitioners' assertion, the team considered and rejected a range of educational placements for [REDACTED] including a residential setting that Petitioners preferred. A residential placement is among the most restrictive placements, and was rejected because the team believed that it would not allow [REDACTED] to access the general curriculum or typically developing peers.
13. The Petitioners contend that the ALJ erred in concluding that the Petitioners withheld outside evaluation information. The record is clear. The Petitioners had a privately obtained evaluation from Dr. Naylor that had been conducted several weeks before the August IEP meeting. It was not made available to the IEP team at that meeting.
14. The Petitioners contend that the conclusion reached by the ALJ that instructional methodology and the staffing decisions are administrative matters and are not decisions to be made with or by the parents in developing the IEP. The Petitioners' argument has no basis, for these are clearly within the province of the administration of schools. That some information was shared with the parents concerning methodology and staffing during the IEP meetings does not mean the parents can make the decision on these matters.
15. The Petitioners contend that the first prong of the *Burlington* ruling was not met during the hearing. Their primary argument was that the placement was predetermined by the schools. Nothing in the record supports a predetermination. A draft IEP was provided as a beginning point for the meeting. This is standard practice and is not an indication that any decisions have been made. The Petitioners further contend that the absence of goals to provide for [REDACTED] mental health needs is a further indication of the failure to provide FAPE. They then mention [REDACTED] anxiety. The schools had no real knowledge of any mental health needs until the Petitioners finally introduced evidence at the due process hearing. This argument has no merit.
16. The Petitioners contend that the conclusion that ALJ should not have concluded that the Petitioners are barred from private school reimbursement due to their failure to provide the ten-day notice prior to enrolling [REDACTED] in [REDACTED]. The record could not be clearer. The

Petitioners enrolled [REDACTED] in the [REDACTED] School on September 13, 2013. There was no notice to the Respondent prior to this. The Respondent did not know of [REDACTED] enrollment until the IEP meeting of September 25, 2013. The Petitioners' arguments on this issue are without merit.

17. The Petitioners attempt to make an argument that the Petitioners were not provided an opportunity for a fair trial during the hearing in this case. The argument is based on [REDACTED] hearing loss. As it could affect parental participation, this argument could possibly have some merit. The Petitioners' Written Arguments to the SRO bring out several things that were totally absent in the record of the case, specifically that [REDACTED] was unable to effectively participate because she could not hear some of the testimony and thus could not assist counsel. During testimony there are some remarks by the ALJ that individuals should speak louder and some requests for an individual to repeat the statements made. This is not unusual in a hearing. Except for these, the record does not support the Petitioners' contentions. Nothing in the pre-hearing documents indicates that provisions need to be made to accommodate [REDACTED]. The written record, including transcripts, has no formal motion or even objections pertaining to [REDACTED] inability to participate.
18. The Petitioners in their Exceptions and Written Arguments submitted to the Review Officer requests that the Review Officer consider a Motion concerning a relief from judgment or a new trial. The Review Officer has received no such Motion.

#### **The Administrative Law Judge's Decision**

19. In a Decision dated February 27, 2015, the ALJ held:
  - 1) Petitioners had the burden of proof on all issues before the Office of Administrative hearings.
  - 2) Petitioners failed to meet their burden that Respondent failed to offer [REDACTED] a free appropriate public education for the 2013-2014 school year.
  - 3) The IEP developed on August 23, 2013 and September 25, 2013 offered [REDACTED] a free appropriate public education for the 2013-2014 school year.
  - 4) Petitioners failed to prove that Respondent did not have the capacity to implement the IEPs developed for the 2013-2014 school year or that teachers assigned to implement [REDACTED] special education services were not sufficiently trained.
  - 5) Even if Petitioners had met their burden that Respondent failed to offer [REDACTED] a free appropriate public education for the 2013-2014 school year, Petitioners failed to show that they had a legal claim for reimbursement for the private program selected for the 2013-2014 school year because Petitioners failed to comply by the 10-day rule and failed to show that the private program was appropriate.
  - 6) As a matter of law, Petitioners are not entitled to reimbursement for the private program selected for the 2014-2015 school year based on an alleged denial of a free appropriate public education in the 2013-2014 school year.
  - 7) Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that all of Petitioners' claims are DISMISSED WITH PREJUDICE.

### **Facts Related to the Appeal Itself**

20. The Petitioners submitted a document to the Office of Administrative Hearings dated April 2, 2015 entitled "Petitioners Exceptions and Written Arguments." It was interpreted as a Request for Appeal. As the Petitioners received the ALJ's Decision on March 4, 2015, they had 30 days to appeal the Decision. It was timely submitted but sent to the wrong party.
21. The applicable law is clear and it was noted in the ALJ's Decision that the appeal must be made to the North Carolina Department of Public Instruction. The OAH forwarded the appeal, although the 30 days for receipt by the North Carolina Department of Public Instruction had lapsed. Fortunately for the Petitioners, the person responsible for receiving appeals in the North Carolina Department of Public Instruction had been copied by the Petitioners and received the appeal within the time period prescribed. It was therefore interpreted that the appeal was timely and the appeal process was set in motion.
22. This Review Officer was appointed on April 10, 2015.
23. Written Arguments were requested and both parties on April 13, 2015. The Petitioners had already submitted some Written Arguments in their appeal. Both parties submitted Written Arguments on April 27, 2015. Those from the Petitioners supplemented the ones previously submitted.

The Review Officer makes the following:

### **CONCLUSIONS OF LAW**

1. The Office of Administrative Hearings and the Review Officer for the State Board of Education have jurisdiction over this case pursuant to Chapters 115C, Article 9 of the North Carolina General Statutes; NC 1500, *Policies Governing Services for Children with Disabilities*; the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. §1400 *et seq.*; and IDEA's implementing regulations, 34 C.F.R. Part 300.
2. IDEA was enacted to "ensure that all children with disabilities have available to them a Free Appropriate Public Education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. §1400(d)(1)(A), IDEA; the implementing federal regulations, 34 C.F.R. Part 300; G.S. 115C - Article 9; and NC 1500, *Policies Governing Services for Children with Disabilities*. All these provisions have specific procedures that a LEA must follow in making FAPE available.
3. The Respondent is a local education agency receiving funds pursuant to 20 U.S.C. §1400 *et seq.* and the agency responsible for providing educational services to students enrolled in the Winston-Salem/Forsyth County Schools. The Respondent is subject to the provisions of applicable federal and state laws and regulations, specifically 20 U.S.C. §1400 *et seq.*; 34 C.F.R. Part 300; G.S. 115C, Article 9; and the North Carolina *Policies*, NC 1500. These acts and regulations require the Respondent to provide FAPE for those children in need of special education.

4. ■■■ has been identified as needing special education services. As he is domiciled in Forsyth County, he is entitled to a free appropriate public education (FAPE) from the Respondent.
5. A free appropriate public education is one that provides a child with a disability with personalized instruction and sufficient support services to enable the student to benefit from the instruction provided. The individualized educational program (IEP) must be reasonably calculated to enable the child to receive benefits. *Hendrick Hudson Dist. Bd. Of Ed. v. Rowley*, 458 U.S. 176 (1982); *Burke County Board of Education v. Denton*, 895 F.2d 973 (4<sup>th</sup> Cir. 1990)
6. G.S. 115C-109.6 - 109.9 and the *Policies* (NC 1504, 1.12 - 1.17) provide the guidelines to be used in the hearing and administrative review process. The hearing by the ALJ and review by this Review Officer must be conducted in accordance with these provisions.
7. In *Schaffer v. Weast*, 546 U.S. 49 (2005), the Supreme Court decided that those who challenge educational decisions made by schools have the burden of proof in due process hearings. Thus, the Petitioners have the burden to show by a preponderance of evidence that the Respondent did not offer ■■■ a free appropriate public education, that they followed the procedural requirements for notice, and that they are entitled to reimbursement for their unilaterally chosen private education. For the reasons set forth in the following, the Petitioners have not met this burden.
8. In *Hendrick Hudson Dist. Bd. Of Ed. v. Rowley*, 458 U.S. 176, 206 (1982) the Supreme Court established both a procedural and a substantive test to evaluate compliance with the IDEA. The Court provided:

First, has the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Acts' procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.
9. Public schools are not charged with providing the best program, but only a program that is designed to provide the child with an opportunity for a free appropriate public education. (*Rowley* at 189-90) The public school satisfies this test if it provides "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Burke County Bd. Of Education v. Denton*, 895 F.2d 973, 980 (4<sup>th</sup> Cir. 1990) (quoting *Rowley* at 203) There is no requirement for a school to maximize a child's potential. (*Rowley* at 197)
10. To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. § 1412(a)(5)(A); 34 CFR 300.114(a); GS 115C-106.3(10) Federal Regulations also recognize a preference for placement as close as possible to the student's home and the school the child would attend if not disabled. 34 CFR 300.552(b), (c) The placement chosen by the IEP team meets the LRE requirements.

11. Even if the parents believe that their choice provides a better education, that does not make the school's choice inappropriate. *Z.W. v. Smith*, (4th Cir. unpublished case no. 06-1202, December 21, 2006) The parents choice of ██████ School was obviously because they thought the ██████ School's program was "state of the art" and a better education for ██████ that would maximize his potential. Public schools are not charged with providing the "best." (*Rowley* at 189-90, 197)
12. Contrary to the Petitioners' arguments, the IEP for ██████ was not predetermined. Nothing in the record supports a predetermination. A draft IEP was provided as a beginning point for the meeting. This is standard practice and is not an indication that any decisions have been made. An IEP team that has a draft IEP available merely shows that some planning and forethought has gone into the process, not that decisions have already been made. The Petitioners' arguments regarding predetermination of the IEP have no merit.
13. Decisions made by schools in implementing IDEA are normally entitled to substantial deference. A court's role in reviewing an administrative proceeding concerning IDEA "is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities they review." *Hendrick Hudson Dist. Bd. Of Ed. v. Rowley*, 458 U.S. 176, 206 (1982) This was reinforced by the Fourth Circuit in *Tice v. Botetourt County School Board*, 908 F.2d 1200 (4<sup>th</sup> Cir. 1990)
14. One should be reluctant to second-guess the judgment of educational professionals simply because one disagrees with them. Therefore, both the Administrative Law Judge and Review Officer must defer to the IEP team decision in this case because those decisions were clearly made in accordance with the law.
15. The IDEA enumerates specific requirements with regard to the content of the IEP document and there is no requirement that additional information be included in the IEP. 20 USC §1414(d)(1)(A); 34 CFR 300.320(d). An IEP must detail the student's current status, set forth annual goals for the student, and state the special services and other aids that will be provided to the child, as well as the extent to which the child will be mainstreamed *MM ex rel DM v. Sch. Dist. of Greenville County*, 303 F.3d 523,527 (4<sup>th</sup> Cir. 2002)
16. Instructional methodology, identity of teaching personnel, and qualifications and training of personnel are not decisions of the IEP team and there is no requirement or expectation that this information be included in the IEP. *J.L. v Mercer Island Sch. Dist.*, 592 F.3d 938 (9<sup>th</sup> Cir 2010)
17. The choice of methodology is up to the schools. *Hendrick Hudson Dist. Bd. Of Ed. v. Rowley*, 458 U.S. 176 (1982); *Barnett by Barnett v. Fairfax Co. School Bd.* 927 F. 2d 146, 151 (4th Cir. 1991) *Rowley* and its progeny leave no doubt that parents, no matter how well motivated, do not have a right to compel a school district to provide a specific program or employ a specific methodology in providing for the education for their disabled child. *Lachman v. Illinois State Board of Education*, 852 F.2d 290 (7<sup>th</sup> Cir. 1988); *see also W.R. v. Union Beach Bd. of Educ.*, 414 Fed Appx. 499 (3<sup>rd</sup> Cir. 2011) (holding that a school district complied with the procedural requirements of IDEA where the district informed parents generally that the child would receive instruction using a multi-sensory reading program).

18. If parents request reimbursement for unilaterally chosen private education, the requirements the parents must meet are set forth in *School Committee of the Town of Burlington v. Dept. of Education*, 471 U.S. 359 (1985); *Florence County School District Four v. Carter*, 510 U.S. 7 (1993), and *Forest Grove v. T.A.*, 129 S.Ct. 2484 (2009). This concept has been codified in 20 U.S.C §1412(a)(10)(C):
- (ii) If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.
  - (iii) Limitation on reimbursement. The cost of reimbursement described in clause (ii) may be reduced or denied if (I) -
    - (aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
    - (bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa).
19. Applying this “Burlington” concept, a two-pronged test is now used to determine if reimbursement for a unilateral parentally made private placement: 1) did the LEA make FAPE available? and, if not; 2) was the parents' placement appropriate? There is no requirement to compare the public education offered with the private placement. *Lewis v. Sch. Bd. of Loudoun County*, 808 F.Supp. 523 (E.D. Va. 1992); *see also Redding Elem. Sch. Dist. v. Gayne*, 3 IDELR 118 (E.D. Cal. 2001) (finding that the hearing officers comparison of the LEA’s proposed program to the private program placed an impossible burden on the LEA, and that there was no requirement for the LEA to duplicate the level of comfort the student experienced in the private school environment).
20. If the answer to the first prong of the “Burlington test” is “yes,” then there is no need to visit the second prong. Regardless of the answer to the first prong, if the parents do not comply with one of the provisions of 20 U.S.C §1412(a)(10)(C)(iii), reimbursement may be reduced or denied. In the present case, the Petitioners did not comply with either subparagraphs (aa) or (bb) of 20 U.S.C §1412(a)(10)(C)(iii)(I):
- a) In the August 23, 2013 IEP meeting they did not reject the placement proposed and inform the Respondent that they were enrolling [REDACTED] in [REDACTED] School.
  - b) They did not give the required 10-days notice before enrolling [REDACTED] in [REDACTED] School. [REDACTED] was enrolled in [REDACTED] on September 13, 2013. The LEA was not informed until September 25, 2013.
21. The Petitioners made an effort to show that they should be exempt from the 10-day rule because of [REDACTED] anxiety, that enrollment in the public school setting would be harmful to him. There is an exception in IDEA that may exempt the parents from the notice requirement if the proposed placement would be likely result in serious emotional harm. 20 U.S.C. § 1412(a)(10)(C)(iv)(II)(bb); 34 CFR 300.148(e)(2)(ii) Although [REDACTED] had been diagnosed with adjustment disorder with anxiety, he experienced anxiety in in many school

settings (including [REDACTED] and has always been able to overcome it. The testimony from Dr. Hughes was convincing. The symptoms are temporary. [REDACTED] can have episodes of anxiety anytime things are not going his way. The Petitioners attempt to show that they should be exempt from the 10-day rule because of [REDACTED] anxiety was not persuasive. The record is clear. The Petitioners were knowledgeable of the 10-day notice requirement but deliberately did not provide it. Deliberate failure to give the required notice, in itself, is enough to deny reimbursement.

22. Petitioners withheld outside evaluation information from the IEP team. They also withheld information about [REDACTED] visits to mental health providers and his diagnosis of adjustment disorder with anxiety following the August IEP meeting. An IEP team can only make decisions based on information about the child that is available at the time of the meeting. The parents also argue that the IEP did not adequately provide for [REDACTED] mental health needs. Until the hearing in this case, the parents never disclosed important information about [REDACTED] mental health. In fact, they intentionally concealed information from the IEP team. Parent participation in the development of the IEP is expected, and “before they can fairly argue that the best the school authorities had to offer was or is not good enough, the critical pre-requisite is that the parents must have cooperated with school authorities ... to try to develop the IEP.” *S.M. v. Weast*, 240 F.Supp 2d 426, 436 (D.Md. 2003)
23. It appeared that Petitioners’ primary concern was their belief that the staff at [REDACTED] School, operated by the Respondent, did not have the training and capacity to implement the IEP. Petitioners testified concerning their lack of trust in the administration and staff of the Respondent. Instructional methodology, identity of teaching personnel, and qualifications and training of personnel are administrative matters within the purview of the Respondent and not subject to decision-making by the parents in the IEP team process. Furthermore, notwithstanding Petitioners’ feelings about the LEA’s educational program or personnel, lack of trust is not an element of FAPE. *see* 34 CFR § 300.17 and 34 CFR § 104.33.
24. The Petitioners base their claim for reimbursement on their assertion that The Respondent failed to offer a free appropriate public education for school year 2013-2014. The Petitioners had the burden but failed to show this. The Review Officer concludes that the Respondent’s IEP as well as the offered placement met the requirements of a free appropriate public education.
25. As the Respondent made an offer of a free public education for the school year 2013-2014, the Petitioners have no right to be reimbursed for their unilaterally chosen private education.
26. Petitioners are not entitled to prospective relief for the private placement for the 2014-2015 school year based on the claims that [REDACTED] was not offered FAPE prior to the beginning of the 2013-2014 school year. The issue of whether the Respondent failed to offer FAPE for the 2014-2015 school year was never raised in the hearing. As FAPE was offered for the 2013-2014 school year, Petitioners certainly cannot claim reimbursement for the subsequent school year without first showing that the Respondent could not, or would not provide FAPE for that school year.

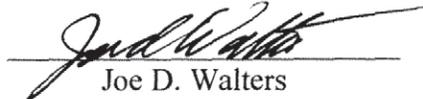
27. The Petitioners made an argument on appeal that the Petitioner, ■ was unable to effectively participate in the hearing before the ALJ because of a hearing impairment. It is a procedural requirement in IDEA that parents are allowed to participate in the entire process of providing FAPE. The provisions of 20 U.S.C. § 1415, Procedural Safeguards, guarantee the right of the parents to participate in the process of decision making for their child. That includes participation in a hearing related to the failure to provide FAPE.
28. The Petitioners also claimed ADA violations related to ■ being unable to participate effectively. The Review Officer has no jurisdiction over ADA claims. Both the ALJ and Review Officer are restricted by law in dealing only with IDEA. This is not the venue for an ADA complaint.
29. Certainly, if proven, not allowing effective participation in the hearing would be a procedural violation of IDEA. The record, however, does not support the allegation that ■ was unable to participate effectively. There were some instances when individuals were asked to speak louder, but this occurs in any hearing. It is not unusual to ask a witness to speak up or to repeat what they have said. Nothing in the pre-hearing documents indicates that provisions need to be made to accommodate ■. The Petitioners never made a motion regarding hearing assistance nor did they make objections concerning ■ not hearing the proceedings well enough to effectively participate. The Review Officer is restricted to the record of the hearing, and must make decisions based on that record. The Petitioners failed to show that ■ was denied the opportunity to participate in the hearing.
30. The Petitioners, in their Exceptions and Written Arguments, have requested relief from judgment of the ALJ or a new trial. Once submitted, the ALJ's Decision is final and OAH loses jurisdiction over the case. North Carolina *Policies*, NC 1504-1.15, clearly provides that the avenue to be followed if one disagrees with the ALJ Decision is an appeal to the State Educational Agency, which appoints a Review Officer. Those *Policies* allow the Review Officer to seek additional evidence if necessary and to hold a hearing to receive that evidence. In this case, the Review Officer is not persuaded that it is necessary. There is nothing in the record of the case that shows that the Petitioners did not get a fair hearing before the ALJ. Having raised no objections in the record, asking for relief at this point in the proceedings is misplaced.
31. Having the burden in this case, Petitioners have failed to show by preponderance of the evidence that:
  - a) The Respondent did not offer ■ a free appropriate public education for the 2013-2014 school year.
  - b) The Petitioners gave the Respondent the required notice before enrolling ■ in their unilaterally chosen private educational program.
  - c) ~~The Petitioners were entitled for reimbursement for the unilaterally chosen private educational program for the 2013-2014 school year as well as for the 2014-2015 school year.~~
  - d) ■ was denied the opportunity to effectively participate in the hearing.

Based upon the Findings of Fact and Conclusions of Law, the undersigned enters the following:

**DECISION**

1. The Decision of the Administrative Law Judge dated February 27, 2015 is upheld.
2. The Petitioners have not met their burden of proving that the Respondent failed to offer [REDACTED] a free appropriate public education for both the 2013-2014 and 2014-2015 school years.
3. The Petitioners have not met their burden of proving that they gave the required notice prior to enrolling [REDACTED] in the unilaterally chosen private school.
4. The Petitioners have not met their burden of showing that they were entitled to any reimbursement for their purchase of unilaterally chosen private education.
3. The Petitioners are not entitled to any relief.

This the 1<sup>st</sup> day of May 2015.

  
Joe D. Walters  
Review Officer

**NOTICE**

Any party aggrieved by this Decision may institute a civil action in state court within 30 days after receipt of this Decision as provided in G.S. 115C-109.9 or file an action in federal court within 90 days as provided in 20 U.S.C. §1415. Please notify the Exceptional Children Division, North Carolina Department of Public Instruction, in writing of such action so that the records for this case can be forwarded to the court.

CERTIFICATE OF SERVICE

I hereby certify that this Decision has been duly served on the Petitioners and Respondent by U.S. Mail. It has been served on attorneys for the Petitioners and Respondent by certified U.S. Mail and e-mail, addressed as follows:

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This the 1<sup>st</sup> day of May, 2015

  
\_\_\_\_\_  
Joe D. Walters  
Review Officer