

APPENDIX

IOWA DEPARTMENT OF EDUCATION

In re: Samuel S.)
)
 Steve and Stacy S.)
)
 Appellants)
 v.)
)
 The Lewis Central Community)
 School District and the Loess Hills)
 Area Education (AEA 13))
)
 Appellees)
)

(Cite as 23 D.o.E. App. Dec. 201)

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 DEPARTMENT OF EDUCATION
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DECISION

#143

Admin. Doc. SE- 297

The above entitled matter was heard before Administrative Law Judge (ALJ) Carla A. Peterson on March 10 and April 20, 2005 in Council Bluffs, IA. The hearing was held pursuant to Iowa Code Section 281.6 of the Rules of the Iowa Department of Education [Iowa Administrative Code (I.A.C.) 281-41.112-41.125] and applicable regulations from the Individuals with Disabilities Education Act (IDEA) as amended in 1997. While the IDEA has been amended recently, the actions subject to this hearing were taken under the auspices of IDEA 97. The hearing was evidentiary and was closed to the public. The Appellants were present and were represented by Attorney Curt L. Sytsma of The Legal Center for Special Education. The Appellees were present and were represented by Attorney Joseph Thornton of Smith Peterson Law Firm. The hearing was held at the Loess Hills Area Education Agency 13 located at 24997 Highway 92 in Council Bluffs.

A request for a Due Process Hearing, filed by the Appellants on behalf of their son, Samuel S. (hereinafter referred to as "Sammy" or "Sam"), was received by the Iowa Department of Education on December 17, 2004. The issue that prompted this proceeding is the unilateral placement of Sammy in a program for children with hearing impairments operated by Boys Town National Research Hospital (BTRNH) and located in Washington Elementary School, one of the Omaha Public Schools' (OPS) buildings. Sammy, born on February 16, 1999, is a kindergartener during the current (2004-2005) academic year. Sammy was diagnosed with auditory neuropathy shortly after birth, and he and his family began receiving early intervention and early childhood special education services approximately a month after his birth. The fact that Sammy is a child entitled to special education services is not disputed. The Appellants contend that Sammy was denied a free and appropriate public education (FAPE) in the least restrictive environment (LRE) during the 2004-2005 academic year because the Lewis Central Community School District (LCCSD) and the Loess Hills Area Education Agency (AEA) 13 offered an education that was inappropriate to his needs and far more restrictive than necessary

to meet his needs. Specifically, the Appellants assert that Sammy's placement was procedurally inappropriate because the Individualized Education Program (IEP) team did not include the teachers who knew the child, the parents were not permitted a meaningful role in the placement decision, and the placement offered was ambiguous. The Appellants asserted that Sammy's placement was substantively inappropriate because it did not represent the LRE, and it would have denied him peers who use the SEE-II language system and same-age peers. The Appellants further contend that after giving the Appellees an opportunity to correct the cited failure to offer an appropriate program in the LRE, the Appellants provided an appropriate program at their own expense, and so seek reimbursement for all costs borne to provide that appropriate program.

A hearing was scheduled for February 14 and 15; a series of requests for continuance were received and granted. The Appellants requested a continuance on two occasions for the purpose of having additional time to prepare and exchange all relevant educational records and prepare a list of witness; these requests were granted. The first request was received on January 12, 2005, and a continuance until February 25, 2005 was granted. The second request, for a continuance and rescheduling of the Hearing, was received on February 8, 2005; the hearing was rescheduled for March 10, 2005, and a continuance until March 25, 2005 was granted. The hearing was convened on March 20, 2005; following the Appellant's opening statement, the Appellees requested a continuance. The Appellees requested a continuance in order to better prepare arguments as they claimed that they did not interpret the reference to a denial of "FAPE in the LRE" to encompass the process of development of the Individualized Education Program (IEP) that guides that process. A continuance was granted until May 16 (Transcript, February, 14). During closing arguments in the April 20, 2005 hearing, the Appellants requested a continuance for the purpose of having time to prepare briefs for consideration by the ALJ. A continuance until May 27, 2005 was granted, and the following schedule was developed for exchange of post-hearing briefs: the Appellants were to deliver their brief to all parties by April 29, 2005, and the Appellees were to deliver their brief to all parties by May 13, 2005.

Findings of Fact

The Administrative Law Judge finds that she and the Iowa Department of Education have jurisdiction over the parties and the subject matter involved in the appeal. The Appellees argued that the Appellants should not be considered residents of the LCCSD. The Appellants had rented an apartment in Omaha in order to gain residency in the Omaha Public Schools (OPS) and by so doing reduced their immediate financial obligation to the OPS. However, Steve and Stacy S. reside within the LCCSD, and Sammy's older sibling attends school in the LCCSD. Thus, the argument that the family no longer lives within the LCCSD is without merit.

Background and Early Educational Experiences

Sammy S., son of the Appellants, Steve and Stacy S., was born on February 16, 1999. According to medical and educational records, Sammy has been diagnosed with auditory neuropathy and has a profound hearing loss for speech sounds and any sounds in the higher frequencies. Sammy and his family began receiving early intervention services from BTNRH in 1999. When the family moved to Council Bluffs, they began receiving early intervention services from AEA 13 beginning in the fall of 2000. An early childhood specialist and speech pathologist provided in home services until fall of 2001 when Sammy was enrolled in the

preschool program at Iowa School for the Deaf (ISD) three days a week. A speech pathologist continued bi-weekly visits.

Sammy received a cochlear implant in August, 2002, and "initial hook-up" of the cochlear implant occurred in September, 2002. Sammy continued in the preschool program at ISD through the 2002-2003 academic year, but his parents claimed that in the special education program at ISD, Sammy "was not successful in meeting goals set for him by his educational team during that time" (Parents' Record, p. 251). Beginning in the fall of 2003, Sammy's parents enrolled him in the BTNRH Preschool Program for Deaf and Hard of Hearing Children where he attended five mornings a week; the physical location of this program was Washington Elementary School in Omaha. Beginning in January, 2004, Sammy was again enrolled at ISD three afternoons per week as a "support service to the BTNRH Preschool Program"; however, Sammy attended only 24% of the intended afternoons (School Record, p. 126).

A Parent/Guardian Staffing Notification was sent on February, 18, 2003, and a staffing meeting was held on February 27, 2003 (Parents' Record, p. 78; School's Record, p. 70). Duration listed for the IEP developed at that meeting was February 14, 2003 through February 14, 2004 (Parents' Record, pp. 80-93; School's Record, pp. 71-81). This IEP was implemented at ISD through the duration of the 2002-2003 academic year and through the summer of 2003 when Sam received Extended School Year Services in the areas of speech-language and audiology services (Parents' Record, p. 92; School's Record, p. 79). Several progress reports (Parents' Record, pp. 94-108; School's Record, pp. 82A-82D) were completed by ISD staff members through May, 2003. Sammy was officially withdrawn from ISD on August 18, 2003 (Parents' Record, p. 80 and p. 109). Sammy was enrolled in the BTNRH Preschool Program for Deaf and Hard of Hearing Children in September, 2003; observational records used for IEP development began on September, 2, 2003, but the first IEP developed for use in the BTNRH program is dated October 10, 2003 (Parents' Record, pp. 110-133). An addendum to that IEP was developed on December 16, 2003; services at ISD were added to the BTNRH Preschool Program (Parents' Record, pp. 134-137). That IEP stated that the "BTNRH Preschool staff will attain input from ISD staff and will be responsible for quarterly IEP updates" (Parents' Record, p.134).

Current Dispute

The current dispute arose over development of Sammy's IEP and proposed placement for the current (2004-2005) academic year when Sammy is attending kindergarten. It is important to examine both the process of developing an IEP and making a placement decision, as well as to examine the resulting document/s whenever considering an issue regarding provision or denial of FAPE. A series of meetings was held on June 1, June 4, and June 8, 2004, for the purpose of developing Sammy's IEP; the record reflecting these meetings is confusing, and testimony during the hearing indicated that different individuals held a variety of perspectives on those meetings. It appears that meeting attendance became almost a "tag team" endeavor as a different set of individuals, with many overlapping, was gathered for each of the meetings. Apparently, these meetings occurred at the very end of the school year and some people were unable to attend the later meetings because they were either off contract or had made other plans (e.g., scheduled surgery) that could not be rearranged. Also, testimony and records highlight a number of themes that the Stacy and Steve S. stressed as important in making their decisions regarding

Sammy's education: use of the SEE-II sign language system, critical mass of like peers (with cochlear implants) for Sammy, teacher/s who could use a Total Communication approach, exposure to good language models, continued speech therapy, smaller classroom size, Sammy's not being ready to use an educational interpreter in a general education classroom, and opportunities for mainstreaming when he is ready.

Planning meetings

The first of this series of meetings, held on June 1, 2004, was attended by the following people: Stacy S., Sammy's mother; Shelly Hagemoser, Sammy's teacher at BTNHR Preschool; three staff members from the Lewis Central District -- Barbara Grell, principal at Kreft Elementary School, Laurie Thies, Director of Special Education, and Linda Hahn, a classroom teacher; and two staff members from ISD -- Sara Planck, Sammy's preschool teacher, and Jane Gradoville, elementary counselor. The report of this meeting (Parent's Record, pp. 198-205; School's Record, pp. 83-86) referred to it as an IEP meeting, and Stacy S. testified that she understood "it to be an IEP meeting" (Transcript, April, 20, p. 57); records and testimony indicate that the meeting lasted 2 ½ hours (Parents' Record, p. 201; School's Record, p.86). There was no notice of this meeting in the hearing records, and Laurie Thies testified that, "It (the meeting) was not in my understanding an IEP meeting", but rather a conference that Stacy S. had requested to allow the staff members from Boys Town to share information about Sammy's program (Transcript, April 20, pp. 9-12). Laurie Thies indicated that the staff members from LCCSD and ISD did not consider it an IEP meeting because no staffing notification had been sent. It should be noted that the OPS was not represented properly for the June 1st meeting to be considered an official IEP meeting either. The report from the June 1, 2004 meeting states that Laurie Thies indicated that the district would need to develop an IEP for Sam and then determine placement for him and further, that they (LCCSD) did not have the necessary people at this meeting and another meeting would be conducted on June 4, 2004 (Parents' Record, p.201; School's Record, p.86). Stacy S. testified that during the June 1st meeting, she asked that staff members from LCCSD check out the program at Washington (the BTNHR program) "because that's where I would like Sam to go to school", and that she assumed final decisions wouldn't be made that day because the team would need time to check out the program that she had introduced into the discussions (Transcript, April 20, p. 61).

Another meeting was held on June 4, 2004. A Parent/Guardian Staffing Notification for this meeting was prepared on June 1, 2004, and that notice states that it was given to Mr. and Mrs. S. via personal delivery on June 4, 2004. Individuals identified on that notice as possible attendees at the June 4 meeting included: staff members from the LCCSD -- Barb Grell, Principal at Kreft Elementary School, Linda Hahn, a kindergarten classroom teacher, and Laurie Thies, the Special Education Coordinator; staff members from AEA 13 -- Cal Sinn, Regional Coordinator, Jenny Bakkerud, audiologist, and Joan Wood, a teacher; staff members from ISD -- Shari Slater, ISD Principal, and Jane Gradoville, ISD counselor. Notably absent from the list were any staff members from the BTNHR Preschool Program and Sara Planck, ISD preschool teacher. When asked why there was not an invitation extended to Sammy's then current teacher, Shelley Hagemoser, Ms. Thies testified that it was an oversight, but that Ms. Hagemoser was aware of the meeting and aware that she was invited to attend because the June 4th meeting had been discussed at the earlier meeting as noted in the report of the June 1st meeting (Transcript, April 20, p. 13-14).

Notification of the June 4th meeting and what transpired that day is a point of contention in this matter. First, neither Stacy nor Steve S. attended the June 4th meeting nor did any staff members from the BTNHR Preschool. Stacy S. testified that she did know about the meeting but that who would attend the meeting had not been discussed and that she made a clerical error that prompted her to think the meeting was scheduled for June 8th (Transcript, April 20, p.62). Additionally, Stacy S. testified that she did not receive the official Parent/Guardian Staffing Notification for the June 4th meeting until Attorney Sytsma showed it to her as part of the school's records for the hearing (Transcript, April, 20, p.63). Laurie Thies testified that she didn't recall if she had mailed the official Parent/Guardian Staffing Notification to Stacy and Steve S. after the June 4th meeting or had simply given it to Stacy when they met again on June 8th (Transcript, April 20, p. 15).

There is conflicting testimony about what happened during the June 4th meeting as well. Laurie Thies testified that the people at the June 4th meeting were "surprised" when Stacy S. did not arrive, so she called Stacy S. and when she learned of the misunderstanding said that she would notify the people who were there that they were going to reconvene on June 8th. Testimony from Stacy S. and Laurie Thies regarding this telephone conversation differ dramatically. Laurie Thies testified that a draft IEP for Sam had been developed prior to the June 4th meeting as is a standard practice in AEA 13, but that "everyone at the table is aware that it's a draft IEP, and there is always opportunity for anyone on the team to provide additional input" (Transcript, April 20, p. 16). Further, she stated that a program for Sam was not discussed at the June 4th meeting and when asked if she could recall telling the parents in a phone call on June 4th "that a placement decision has already been made," she stated, "I would not have done that, no" (Transcript, April, 20, pp. 16-17). Shari Slater, ISD principal, also testified that on June 4th, the team members attending the meeting waited a short time for Stacy S. and when they learned that she would not be coming, they simply left without discussing placement options for Sam. When asked about the accuracy of Stacy S.'s claim that Laurie Thies had called her on June 4th to say that "even though you missed the meeting, placement decision was made," Shari Slater stated, "That would never happen," and continued to relay a story about how an IEP meeting had been rescheduled recently because another parent had missed the meeting (Transcript, April 20, p. 179). Stacy S. described the telephone call from Laurie Thies much differently. Stacy S. testified that Laurie Thies called her after the June 4th meeting to indicate that they had missed her but that Laurie Thies told her, "Don't worry about it. You didn't miss anything important. We finished writing the IEP" (Transcript, April 20, p. 62). Stacy S. went on to say that she then asked about a meeting to decide placement for Sam but was told that "the placement had already been decided" to which Stacy S. said she replied, "You can't decide placement without me. We have to have another meeting" (Transcript, April 20, p. 63). When asked if she was "absolutely certain that you were told the placement decision had been made that day", Stacy S. replied, "Yes" (Transcript, April 20, p. 63).

Another meeting was convened on June 8th. Stacy S. testified that at that meeting, the group discussed the draft IEP that had been developed. She stated that the IEP was partially filled out, and that she was to complete it. Stacy S. testified that Sammy's programming was discussed, that she brought up the issues highlighted above that she and her husband feel are important, and that she made several additions to the draft IEP that was distributed at the

beginning of the June 8th meeting which she assumed would be part of the final IEP. Stacy S. also stated that placement was discussed at the June 8th meeting, but that when she asked about the program at Washington School, Laurie Thies told her that "an out-of-state placement was not an option". Stacy S. testified that a combination of Kreft Elementary School and ISD were discussed as a placement option for Sammy but that the discussion was very generic, that the LCCSD and ISD staff members were not able to answer specific questions regarding who would be in Sammy's class/es or how his time would be spent, and that as a result she didn't feel that she had enough information to make a decision regarding the appropriateness of the proposed placement (Transcript, April 20, pp. 65-71). Laurie Thies testified that Sammy's placement was discussed at the June 8th meeting, that a range of options including options for a combined program at Kreft Elementary and ISD and the BTNRH program at Washington Elementary were discussed, and that Stacy S. wanted more specific information about classroom make-up before she could make a decision, but that the school personnel were not able to provide that type of detail as the enrollment for the 2004-2005 academic year hadn't been finalized (Transcript, April 20, pp. 18-25).

Both Stacy S. (Transcript, April 20, pp. 75-76) and Laurie Thies (Transcript, April 20, p. 21) testified that at the end of the June 8th meeting, Stacy S. gave Laurie Thies a letter stating that the parents had requested that Sammy be placed in the BTNRH program at Washington Elementary School in Omaha and requesting that they be provided a Prior Written Notice explaining reasons for denial of this request (Parents' Record, p. 239). Laurie Thies stated that the placement for Sammy was finalized after the June 8 meeting, that the Prior Written Notice (Parents' Record, p. 247-248; School's Record, pp. 119-120) stated that the recommended program would include a combination of time at ISD and Kreft Elementary, and that the staffing team would reconvene later in the summer to determine a schedule (Transcript pp. 21-27). The school personnel did propose two different schedules for Sammy (School's Record, pp. 128-129). Laurie Thies testified that the first one was developed at the parents' request prior to a mediation session, but that the second one was developed later in the summer and never shared with the parents because the intention had been that the staffing team would reconvene but that did not happen since the parents had chosen to enroll Sammy in an out of district program (Transcript, pp. 28-29).

Individualized Education Program (IEP) documents

2001-2003. Sammy began attending the ISD Preschool Program three days per week in September, 2001. Sammy's IEP, developed on February 14, 2002, notes that according to classroom assessments, his cognitive/developmental, gross and fine motor, social/emotional, and receptive language skills have all been developing at or above normal limits. Also, it notes that Sammy's expressive language and speech skills were below age level, but that he was an effective communicator using sign language, gestures, and speech along with facial and body expressions to convey his wants and needs. These assessments were conducted using observation and non-standardized instruments commonly used with young children who have hearing impairments. The IEP also states that his family members used both SEE-II and ASL with him. The IEP contained one goal: In 36 weeks, at preschool, Sammy will use 4-6 signed and spoken word sentences with an adult to relate needs, wants, events, or experiences with 80% accuracy probing once a month over 3 consecutive months. The IEP states that Sammy would receive speech and language services each week and audiological services as needed, and it lists several

considerations regarding his placement in the LRE. Report cards from the ISD indicate that Sammy was an active participant in classroom activities and making progress in many areas including art, math, language arts, science and health, and work and study skills. The IEP updates completed in March, 2002, November, 2002 and February, 2003 indicate that he was making progress but had not attained the expressive language goal on his IEP.

A new IEP was developed in February, 2003, when Sammy was four years old. This IEP notes that Sammy received a cochlear implant in August, 2002. Assessments reported on this IEP were done with a different measure that is not norm-referenced but is commonly used with preschool-aged children with and without disabilities. This IEP states that Sammy's skills were below developmental expectations in all areas ranging from the 12-22 month range for speech and expressive language skills to the 15-32 month range for receptive language tasks to the 2-3 year range for self-help, general knowledge, and comprehension and social emotional skills to the 2-4 year range for fine motor tasks and the 3-4 year range for gross motor tasks. This IEP contained two goals related to language skills: (1) In 36 weeks, during structured activities, Sam will perform speech and listening tasks with 80% accuracy, and (2) In 36 weeks, Sam will perform receptive and expressive language tasks with 75% accuracy. A progress report for Goal 2 dated May 23, 2003, stated that progress had been made toward the goal but the goal may not be met by the time the IEP is reviewed. No progress report is available for Goal 1. General progress reports from the ISD Preschool Program continued to state that Sammy was an active participant in class activities and making satisfactory progress in developmental and academic areas.

2003-2004 academic year. Sammy began attending the BTNRH Preschool Program in the fall of 2003. Stacy S. testified that Sammy's cochlear implant in the fall of 2002 was "a big change in our plan. He would now be able to – we hoped – speak, and listen, and talk English. And that was our plan for him" (Transcript, April 20, p. 52). Stacy S. testified that in the fall of 2003, she and her husband enrolled Sammy in the BTNRH Preschool Program because, "Sam was not making good progress at ISD. He was not reaching any of the goals on his IEP, and he wasn't progressing at the rate that we thought he could . . ." (Transcript, April 20, p. 53). The next IEP included in the Parents' Records (pp. 110-133) is dated October, 2003. Goals were developed for the areas of receptive language, expressive language, auditory, and speech skills; each goal area included multiple objectives. Detailed progress reports were dated January, 2004, March, 2004 (Parents' Record, pp. 138-155), and May, 2004 (Parent's Record, pp. 161-173). The March report states, "We have noticed that Sam's progress in preschool seems to have plateaued this quarter" (Parents' Record, p. 138), and the May report indicated that 13 of 17 objectives needed continued work.

Standardized, norm-referenced testing of Sammy's language skills conducted at BTNRH showed steady, but slow, growth in specific skills from November, 2002 to October, 2003 to May, 2004 on the Preschool Language Scale-4 (PLS-4); however, Sammy's scores were at or below the 4th percentile on all PLS-4 subscales at all time points. Similar growth in age scores was shown on the Expressive One Word Picture Vocabulary Test (EOWPVT), but Sammy's percentile rank on the EOWPVT actually dropped from the 25th to the 19th percentile across that time period. Some assessments were first administered and reported in May, 2004. At that time,

Sammy scored below the 1st percentile on a test of articulation skills, at the 39th percentile on a vocabulary test, and at the 21st percentile on tests of early reading and early math skills.

Proposed IEP for 2004-2005. At the meeting on June 8, 2004, staff members from LCCSD and AEA presented a "draft" IEP to Stacy S. (Parents' Record, pp. 206-219). According to testimony from Laurie Thies, this is a common practice in AEA 13. Laurie Thies testified that the draft had been prepared by Joan Wood, an itinerant teacher of the hard of hearing, using input from Shelly Hagemoser, the BTNRH teacher, documents available, and the parent Transcript, April 20, p. 20). According to testimony from Stacy S., she did a great deal during that conference to "complete the IEP" (Transcript, April 20, p. 65). The IEP finalized following the June 8th conference (Parents' Record, pp. 224-236) does, indeed, include all the assessment information presented by the BTNRH staff on June 1, 2004, and all the input offered by Stacy S. on June 8, 2004. The IEP contains four goals: (1) In 36 weeks, Sam will improve his speech skills, (2) In 36 weeks, Sam will improve his auditory skills, (3) In 36 weeks, Sam will increase his receptive language skills, and (4) In 36 weeks, Sam will improve his expressive language skills. Each goal is accompanied by several short-term objectives, and those short-term objectives incorporate all objectives suggested by the BTNRH staff members except those that would be considered part of the general education curriculum for a kindergarten program (e.g., Sam will match uppercase to lowercase letters of the alphabet). Stacy S. testified that she signed the IEP developed on June 8 to indicate her attendance at the meeting, but that she was not accepting the IEP as it was (Transcript, April 20, p. 73). This IEP and the Written Prior Notice of Proposed/Refused Action (Parents' Record, pp. 247-248; School's Record, pp. 119-120) state that several options for program placement/delivery of services ranging from full-time placement at ISD, the full-time placement at Washington Elementary School in Omaha, and a combination of ISD and the local school (Kreft Elementary) were considered. The Written Prior Notice further states that the placement recommendation for Sammy was "a program at ISD with integration into a kindergarten program at Kreft Elementary for a portion of the day . . . when integrated into the kindergarten program at Kreft, Sam will have one on one support from a certified teacher of the Hearing Impaired from ISD".

Proposed Programming at ISD. The Appellants asserted that the placement offered by the LCCSD, placement at ISD with integration into a kindergarten program at Kreft Elementary School, would not represent the LRE for Sammy, and further that it would have denied him peers who use the SEE-II language system and same-age peers. Three ISD staff members – Ann Thiessen, a speech and language pathologist; Sara Planck, a teacher of the deaf and hard of hearing; and Shari Slater, ISD principal -- provided testimony to describe their work with Sammy, participation in development of Sammy's IEP, and programming at ISD. Ann Thiessen testified that she had worked with Sammy, both when he was enrolled primarily at ISD and in conjunction with other ISD and BTNRH staff members in 2004. Ann Thiessen testified that she uses a Total Communication approach in her work with students who are deaf or hard of hearing and that she had worked with Sammy and had communicated frequently with the BTNRH staff members about Sammy. She did state that she most frequently uses a sign system called Conceptually Accurate Signed English (CASE), which she said is "not exactly the same" as SEE-II but does call for signing each word and that the ISD staff individualize instruction to meet children's needs (Transcript, pp. 143-144). Ann Thiessen testified that different ISD students use different types of language systems including SEE-II, but did say that the students

who use SEE-II primarily are older than Sammy (Transcript, p. 147). Sara Planck testified that she had worked with Sammy in 2004, has worked with several children who have cochlear implants during her 16 years at ISD, had communicated frequently with the BTNRH staff members about her work with Sammy, and had attended the June 1st meeting with BTNRH staff members (Transcript, pp. 150-155). Sara Planck testified that she is familiar with SEE-II, that the ISD staff members use it when “teaching specific English skills”, and that she could use it though she would “have to really think about it” while using it (Transcript, p. 159). Sara Planck described her experiences co-teaching with a kindergarten teacher in the LCCSD; she said that she thinks that would have been an appropriate strategy for Sammy, though she is not involved in this arrangement right now because there is not a student for whom it is appropriate (Transcript, pp. 157-158). Shari Slater testified that ISD and LCCSD have a 25 year history with integration and co-teaching, that they make this type of programming available for a child of any age when the IEP calls for it, and they (the ISD staff members) were prepared to work out a shared schedule for Sammy (Transcript, pp. 174-176). Shari Slater was asked to review the parents’ concerns noted on the IEP developed on June 8, 2004: use of SEE-II, use of a Total Communication approach, like peers, exposure to good language models, speech therapy, and smaller classroom sizes. Shari Slater stated that ISD would be able to address each of these concerns because staff members are able to use SEE-II and routinely use a Total Communication approach, there are other elementary school students who have cochlear implants including a first grader, several children have well developed speech skills, and speech therapy services and small classroom sizes are a usual part of ISD programming (Transcript, pp. 180-183). When asked specifically, Laurie Thies testified that the IEP clearly described the special education services proposed for Sammy (School Record, pp. 109-110), that those services were reasonably calculated to provide him educational benefits (Transcript, p. 199), and “the service that was proposed for Sam, with a combination of Kreft and ISD, would be appropriate to meet his needs. And, it would include integration with same age and like peers” (Transcript, pp. 202-203).

2004-2005 academic year. Sammy is attending a classroom for children with hearing impairments located at Washington Elementary School in Omaha, the program in which his parents enrolled him unilaterally and with which they report being very pleased. Sammy’s current IEP was developed on November 23, 2004 (Parents’ Record, pp. 275-286); though not stated, it appears that the IEP developed in June, 2004, must have been used to guide programming until late November or no IEP was used. The current IEP contains goals in the following areas: receptive and expressive language, auditory and speech skills, reading skills, language arts skills, math skills. Ten of the 14 objectives in the areas of receptive and expressive language and auditory and speech skills are very similar to objectives on the IEP developed in June, 2004. Goals and objectives in the areas of reading, language arts, and math are reflective of general education curriculum for a kindergarten student. The current IEP states that Sammy is involved in special education services 100% of the time each week.

Conclusions of Law

The issues before this ALJ are first, whether the LCCSD and AEA 13 denied FAPE to Sammy S. If, and only if this is so, this ALJ must determine whether the unilateral placement made by his parents is appropriate to meet his needs in which case, his parents would be entitled to reimbursement for costs associated with that placement.

The IDEA requires that all children with disabilities have available a free appropriate public education that provides 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)] and provided in conformity with the Individualized Education Program (IEP) [20 U.S.C. § 1401 (8)(D)].

A two-part inquiry is required to determine whether a denial of FAPE has occurred. First, this ALJ must determine whether the LCCSD and AEA complied with the procedures set forth in the IDEA. Second, this ALJ must determine whether the program developed via IDEA specified procedures is reasonably calculated to confer educational benefit [*Board of Education of the Hendrick Hudson Central School District v. Rowley*, 102 S. Ct. 3034, 553 IDELR 656, (U. S. Supreme Court, 1982)] upon Sam, one that guarantees a reasonable probability of educational benefits with sufficient supportive services [*G. D. v. Westmoreland School District*, 930 F.2d 942, 17 IDELR 751, U. S. Court of Appeals, (First Circuit, 1991)]. A determination of procedural violations requires examination of procedures specified by the IDEA, as well as whether any violation of those procedures reaches the threshold of having a substantial impact on the IEP process. Recently, the Sixth Circuit asserted that a procedural violation does not necessarily constitute a denial of FAPE. Rather, it rises to this level only if it causes substantive harm to the child or his parents, such as seriously infringing on the parent's opportunity to participate in the IEP process, depriving an eligible student of an IEP, or causing the loss of educational opportunity [*Berger ex rel. Berger v. Medina City School District*, 348 F.3d 513, 40 IDELR 31, U.S. Court of Appeals, (Sixth Circuit, 2003)]. Placement decisions are part of the educational planning for a child entitled to special education services, but a placement decision is to be made only after the child's needs, goals, and services have been identified in the IEP.

Procedural History

The IDEA specifies that the public agency has responsibility for initiating and conducting a meeting for the purpose of developing, reviewing, and revising the IEP of a child with a disability [20 U.S.C. § 1413 (a)(1), 1414 (d)(4)(A)]. Furthermore, the public agency must ensure that the IEP team includes the following representatives: (1) the parents of the child; (2) at least one regular education teacher of the child (if the child is, or may be, participating in the regular education environment); (3) at least one special education teacher of the child, or if appropriate, at least one special education provider of the child; (4) a representative of the public agency who is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities, is knowledgeable about the general curriculum, and is knowledgeable about the availability of resources of the public agency; (5) an individual who can interpret the instructional implications of evaluation results; (6) at the discretion of the parent or agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and (7) if appropriate, the child [20 U.S.C. § 1401 (30), 1414 (d)(1)(B)].

An IEP team generally meets at one time to develop an IEP for a child with a disability that is to be in effect for up to a one year period of time. In this case, the record presents a confusing series of meetings, and the actual IEP meeting is a point of contradiction. In actuality, three meetings were scheduled (June 1, 4, and 8, 2004), two were held (June 1 and 8, 2004) and

attended by Stacy S. Testimony of Laurie Thies indicated that the LCCSD intended the June 4th meeting to be the "official IEP meeting". The LCCSD did not provide the official Parent/Guardian Staffing Notification to the parents in a timely manner; however as per testimony of Stacy S. and Laurie Thies, the parents were aware of the meeting scheduled for June 4th because it was discussed at the June 1st meeting. When Stacy S. made a scheduling error that prevented her from being at the June 4th meeting, a meeting was rescheduled for June 8th which is a clear indication that the LCCSD and AEA personnel made efforts to include the parents. Stacy S. attended the June 8th meeting. The Appellants contend that the IEP developed for Sammy S. is procedurally inappropriate because the IEP team that made the placement decision did not include the teachers who knew the child. The hearing record does not support this contention. While confusion surrounding the IEP development process and scheduling the IEP meeting/s so close to the end of the academic year are disappointing, it is not clear that these issues prevented Sammy's parents or teachers from meaningful participation in development of his IEP and denied him FAPE. While different combinations of individuals were present at the different meetings, each of the specified IEP team members was present at one or more of the meetings. Also, the record shows that the meetings on June 1 and 8, 2004 both lasted several hours and included lengthy discussions of Sammy's evaluation results, educational progress and needs, programming goals, and placement options. Furthermore, the record provides evidence that Sammy's then current teachers and special education service providers, as well as Stacy S., made substantial contributions to those discussions and the resulting IEP document reflects that those recommendations were considered seriously. Concerns noted by Stacy S. are all reflected in the IEP, all evaluation results from the BTNRH staff members are included in the IEP, the IEP includes nearly all the goals and objectives recommended by the BTNRH staff members, the IEP lists several accommodations that reflect recommendation made by the BTNRH speech and language therapist Amy Tyler Krings, and the IEP lists several placement options that were considered including the classroom operated by BTNRH and located at Washington Elementary School requested by the parents.

The main point of contention between the parties in the present instance stems from disagreements regarding the placement recommendation of the LCCSD and AEA rather than from disagreements regarding the present levels of performance or goals and objectives portions of the IEP. The IDEA states that the placement decision 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" [20 U.S.C. § 1412 (a) (5)]. Further, the placement decision must be based on the IEP, but the law leaves the matter about specific classroom placement and specific teachers to the discretion of the school. The record does not support that the placement decision for Sammy was made without meaningful consideration of a variety of options that represented a continuum of deviations from the LRE, without consideration of evaluation results and programming recommendations made by BTNRH staff members and the ISD staff members who had worked with Sammy, or without substantial input from the parents. The Written Prior Notice of Proposed/Refused Action developed, as appropriate, subsequent to development of the IEP states that the placement recommended was "a program at ISD with integration into a kindergarten program at Kreft Elementary for a portion of the day as determined by the team . . . and when integrated into the kindergarten program at Kreft, Sam will have one on one support from a certified teacher of the Hearing Impaired from ISD". The Written Prior Notice of Proposed/Refused Action, as well as the IEP, state that a range of placement options was

considered. As stated above, Sammy's parents and individuals knowledgeable of Sammy's skills, evaluation results, and educational needs were involved in extensive discussions regarding review of Sammy's programming and planning for future programming. As the First Circuit ruled, expert opinion which, in that case included recommendations for placement in a private school, must be considered, but not necessarily discussed at length or endorsed, in making IEP and placement decisions for a child [*G. D. v. Westmoreland School District*, 930 F.2d 942, 17 IDELR 751, U.S. Court of Appeals, (First Circuit, 1991)]. One recent ruling by the Sixth Circuit put special emphasis on the parents' having "meaningful" participation in development of the IEP for their child with autism rather than mere physical presence at the IEP meeting. In that case, however, the Court ruled that the IEP team did not give due consideration to assessment information and progress reports from the child's current program, and the parents were requesting a program that differed substantially from the proposed IEP in goals, intensity, methodology, and location. In addition, the Court ruled that the District had a policy of "not considering Lovaas style ABA (the requested type of programming) for autistic children" and a District official "told the Deals that they could not ask questions during the . . . IEP meeting" [*Deal v. Hamilton County Board of Education*, 392 F.3d 840, 42 IDELR 109, U.S. Court of Appeals, (Sixth Circuit, 2004), p. 12]. In a situation similar to the one before this ALJ, the Eighth Circuit Court stated, "the IDEA does not require school districts simply to accede to parents' demands without considering any suitable alternatives" [*Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 31 IDELR 132, U.S. Court of Appeals, (Eighth Circuit, 1999)].

Failure to involve appropriate representatives in an IEP meeting has been ruled a denial of FAPE in some instances; however, those situations differed from the present case in substantial ways. In one instance, the Ninth Circuit ruled that a child was denied FAPE because the district proceeded with an IEP meeting and planned placement in a program that was yet to be developed without including her parents or representatives from the school she had been attending despite the fact that the child's parents had expressed concerns, had informed the district about scheduling difficulties, and had requested a different meeting date [*Shapiro v. Paradise Valley Unified School District*, 317 F.3d 1072, 38 IDELR 91, U.S. Court of Appeals, (Ninth Circuit, 2003)]. An Iowa ALJ recently ruled that FAPE had been denied when representatives from the residential placement currently serving the student were not included in an IEP meeting. However, in that instance the IEP and program proposed by the district differed substantially from recommendations made by professionals then currently working with the student in terms of both goals and intensity which suggests that those recommendations had not been duly considered in discussions of future programming [*Benjamin S. vs. Ames CSD, Heartland AEA 11, and Iowa Department of Education*, Iowa D.o.E. App. Dec 136 (2005)]. In other cases that resulted in denial of FAPE, an IEP meeting was never convened [*Knable v. Bexley Board of Education*, 238 F.3d 755, 34 IDELR 1, U.S. Court of Appeals (Sixth Circuit, 2001)], an IEP was not developed at all [*W. G. v. Board of Trustees of Target Range School District*, 960 F.2d 1479, 18 IDELR 1019, U.S. Court of Appeals (Ninth Circuit, 1992)], the IEP that was developed did not contain sufficient detail and did not include recommendations from professionals working with the child [*T. H. vs. Board of Education of Palatine*, 55 F.Supp.2d 830, 103 LRP 38770, U.S. District Court, Northern District of Illinois (1999)], the district failed to identify a child as having a disability because of failure to properly consider evaluation information [*Babb v. Knox County School System*, 965 F.2d 104, 18 IDELR 1030, U.S. Court of Appeals (Sixth Circuit, 1992); *New Paltz Central School District v. M. S.*, 307 F.Supp.2d 394, 40

IDELF 211, U.S. District Court, Northern District of New York (2004)], or the district denied the student education altogether [*Jackson V. Franklin County School Board*, 806 F.2d 623, 558 IDELR 195, U.S. Court of Appeals (Fifth Circuit, 1986)].

Steve and Stacy S. described the discussions of Sammy's possible school day with the LCCSD and ISD staff members as generic, dismissed the sample schedule provided by the LCCSD as ambiguous, and claimed they could not agree to the recommended placement without more specific information. However, the Appellees argue persuasively that, "it was always the plan in the IEP to work the student's schedule based on his progress and needs as appropriate" (Appellee's Post-Hearing Brief, p. 20) and that knowing a child's exact schedule three months prior to the beginning of school is likely not possible for a public school program serving any child whether disabled or not. The Appellants argue that decisions regarding appropriateness of an IEP must be decided on the IEP provisions actually drafted, rather than those that could have been drafted (Appellants Post-Hearing Brief, p. 19); however, in the case used to support this argument, the court ruled that FAPE was denied because no IEP was actually drafted [*Knable ex rel. Knable v. Bexley Board of Education*, 238 F.3d 755, 34 IDELR 1, U.S. Court of Appeals (Sixth Circuit, 2001)]. The U. S. Supreme Court ruled two decades ago that the IEP is the "modus operandi" of the IDEA [*School Committee of the Town of Burlington, Massachusetts v. Department of Education of the Commonwealth of Massachusetts*, 471 U.S. 359, 103 LRP 37667, U. S. Supreme Court (1985)]. Unlike cases where parents objected to IEPs that were to be delivered in placements that were yet to be developed and required actual physical changes in facilities and securing of personnel (*Board of Education of the City School District of the City of New York 02-077*, 40 IDELR 146, New York State Educational Agency (2003); *Shapiro v. Paradise Valley Unified School District*, 317 F.3d 1072, 38 IDELR 91, U. S. Court of Appeals, Ninth Circuit (2003)], the ISD and LCCSD have a long history of collaborating to provide appropriate programming to children with hearing impairments, have appropriately trained and experienced personnel, and have ready access to the means to make collaborative programming successful (e.g., transportation, working history). Testimony of ISD staff members did not support the notion that they did not have the resources in place to meet Sammy's needs; rather, it appeared that any "ambiguity about the daily schedule" could be characterized better as a willingness to allow the flexibility necessary to individualize Sammy's instructional program. The IDEA states that an IEP is to be reviewed and up-dated at least annually making it clear that the intent is to modify the document as appropriate to meet a child's changing needs. Similar to the situation in *Evans v. Millard Public Schools and the Nebraska Department of Education* [841 F.2d 824, 559 IDELR 381, U.S. Court of Appeals (Eighth Circuit, 1988)], it appears that Steve and Stacy S. made the decision to place Sammy in the BTNRH program before the team could meet closer to the beginning of the 2004-2005 academic year to finalize a daily schedule that all could agree would meet his needs.

Substantive Appropriateness of the IEP

The second question that must be addressed is whether the proposed program is appropriate to meet the needs of the child. The standard of review followed since being set forth by the U.S. Supreme Court more than two decades ago is that the child's IEP be reasonably calculated to confer educational benefit [*Board of Education of the Hendrick Hudson Central School District v. Rowley*, 102 S. Ct. 3034, 553 IDELR 656, U. S. Supreme Court (1982)]. This standard has been reaffirmed and has been used to describe FAPE as one that guarantees a

reasonable probability of educational benefits with sufficient supportive services [*G. D. v. Westmoreland School District*, 930 F.2d 942, 17 IDELR 751, U.S. Court of Appeals (First Circuit, 1991)]. Standards for determining whether an IEP provides FAPE have been outlined [*Cypress-Fairbanks Independent School District f. Michael F.*, 118 F.3d 245, 26 IDELR 303, U.S. Court of Appeals (Fifth Circuit, 1997)] and used consistently [*Adam J. v. Keller Independent School District*, 328 F.3d 804, 39 IDELR 1, U.S. Court of Appeals (Fifth Circuit, 2003); *Lewisville Independent School District v. Charles W.*, 81 Fed. Appx. 843, 40 IDELR 60, U. S. Court of Appeals (Fifth Circuit, 2003)]. Four factors that must be considered include: (1) whether the program is individualized on the basis of the student's assessment and performance, (2) whether the program is administered in the least restrictive environment, (3) whether the services are provided in a coordinated and collaborative manner by the key "stakeholders", and (4) whether positive academic and non-academic benefits are demonstrated.

Using these standards, the IEP and proposed placement offered Sammy were duly conceptualized to provide FAPE. The IEP clearly was individualized to meet his needs as it was based on information from Sammy's most recent assessments and incorporated goals and objectives recommended by his parents and then current teachers.

Steve and Stacy S. argued that Sammy's IEP and proposed placement were substantively flawed because the ISD is a segregated facility and not the LRE, but that contention is not supported by the record. The IEP clearly states that Sammy would be integrated into a kindergarten classroom at Kreft Elementary School and would be accompanied by a certified teacher of the hearing impaired, and the record includes information stating that this individual would serve not as an interpreter but as a team teacher. The individual potentially designated to take this responsibility had previous experience team teaching with a kindergarten teacher and working with children who have cochlear implants. Additionally, testimony from ISD personnel indicated both willingness to have personnel from the two schools work collaboratively to refine Sammy's programming as needed, as well as a rich experience in doing this with children who have similar types of needs. Thus, Sammy would have opportunities to participate with typically developing peers to the maximum extent appropriate. Laurie Thies testified that, "I really look at special education as a service. And I believe that the service that was proposed for Sam, with a combination of Kreft and ISD, would be appropriate to meet his needs. And it would include integration with same age and like peers" (Transcript, April 20, p. 202).

The proposed IEP and placement are designed to provide services to Sammy in a coordinated and collaborative manner by key stakeholders. As stated above, the goals and objectives are appropriate for Sammy and reasonably calculated to provide educational benefit, and staff members from the LCCSD and ISD testified that they have the resources to meet Sammy's needs and have experienced personnel with a history of working collaboratively to serve children with hearing impairments. Finally, the record supports that the IEP developed would provide positive academic and non-academic benefits for Sammy. Progress reports from the ISD show that Sammy was afforded both academic and non-academic benefits from that program prior to enrollment in the BTNRH Preschool Program. Progress reports from ISD and BTNRH staff members and standardized, norm-referenced assessment completed by BTNRH personnel do not support the parents' argument that Sammy made substantial progress in the BTNRH Preschool Program but failed to do so while at ISD.

Steve and Stacy S. argued that the recommended placement would deny Sammy peers who use SEE-II and same-age peers. Actually, parent concerns noted on Sammy's IEP include use of a SEE-II language base and ASL at appropriate times, use of a Total Communication approach that involves simultaneous use of sign and verbal language, and exposure to good language models. The ISD personnel stated that they have the resources available to address these concerns. Judicial decisions regarding use of specific signing systems have concluded consistently that this is a question regarding use of an educational methodology system that should be left to educators. In one case, an Iowa ALJ ruled that differences between the family and school regarding a specific sign system do not "rise to the level that compromises (child's) access to a free, appropriate, public education as assured under the IDEA" [*Ankeny Community School District and Heartland Area Education Agency No. 11*, SE-210, 30 IDELR 451, Iowa State Educational Agency (1999)]. Courts have ruled similarly stating that "debates concerning the best method of educating the hearing-impaired are best left to educators who consider this problem their métier" [*Visco v. School District of Pittsburgh*, 684 F. Supp. 1313 (1998)] and in regard to an even broader question regarding methodology to teach communication skills to a child who was deaf stating that ". . . parents – no matter how well motivated – do not have a right under IDEA to compel the school district to provide a specific program or employ a specific methodology for the education of their disabled child . . ." [*Logue v. Shawnee Mission Public School*, 959 F. Supp. 1338, 25 IDELR 587, U. S. District Court, Kansas (1997)]. Staff members from the ISD testified that students enrolled at the ISD use a variety of sign language systems, sometimes combinations of sign language systems, and combinations of sign and verbal language. The record does not support the contention that the proposed placement would necessarily deny Sammy access to peers who use SEE-II, and legal precedent does not support the contention that even if this were true, that it would constitute a denial of FAPE. Since the proposed placement is a program at ISD with integration into a kindergarten classroom, the record does not support the contention that Sammy would not have same-age peers. Even the fact that ISD staff members testified that they could not be certain there would be kindergarten-aged children enrolled at the ISD during the 2004-2005 academic year, this would not necessarily mean that Sammy would not have peers. The ISD staff members did testify that there are several children in a rather narrow age range (preschoolers to second graders) inclusive of Sammy's age, and that they have had very successful experiences working with children in mixed age groups. It is not clear that not having several children of exactly the same age group could constitute denial of FAPE at any rate. It is a rare circumstance; even in general education classrooms that tend to enroll children of very similar ages, that all the children are working at the same level either academically or socially. Thus, it is not clear that Sammy would not have peers of similar ages and peers working on similar skills in a classroom/s that enrolled children of mixed ages.

The IEP developed for Sammy and the recommended placement are appropriate to provide FAPE and thus, meet the standard outlined in the IDEA [20 U.S.C. § 1400(d)(1)(A), 1401 (8)(D)]. Clearly, Steve and Stacy S. preferred a different program than the one recommended by the LCCSD and AEA and enrolled Sammy in that program. Since an initial challenge decided by the U.S. Supreme Court [*Board of Education of the Hendrick Hudson Central School District v. Rowley*, 102 S. Ct. 3034, 553 IDELR 656, (U. S. Supreme Court, 1982)], courts have ruled consistently that the IDEA guarantees a basic floor of opportunity for an education and that to provide FAPE an IEP must be reasonably calculated to provide

meaningful educational benefit but not necessarily provide the best education possible nor one that will maximize the child's educational potential [*Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245, 26 IDELR 303, U.S. Court of Appeals (Fifth Circuit, 1997); *Houston Independent School District v. Bobby R.*, 200 F.3d 341, 31 IDELR 785, U.S. Court of Appeals (Fifth Circuit, 2000)]. Since the IEP developed and recommended placement are appropriate to provide FAPE for Sammy, the appropriateness of the program in which the parents enrolled Sammy is not an issue that needs to be addressed.

Decision

This ALJ finds that the IEP developed for Sammy S. in June, 2004 was reasonably calculated to provide meaningful educational benefit, in accordance with the IDEA. This ALJ finds that the IEP and recommended placement at ISD with integration into a kindergarten classroom at LCCSD are appropriate to provide FAPE for Sammy in the LRE. Therefore, the Appellees have prevailed in this matter, and the Appellants' claim for reimbursement is denied.

Motions and objections not previously ruled upon, if any, are hereby over-ruled.

The Parties are advised that if aggrieved by this ruling, they may bring civil action through an appeal into either a federal or state court under 34 C.F.R. 300.512 or 281-41.124 I.A.C. If this ruling is not challenged through civil action, it will become the final decision in this matter.

May 27, 2005

May 27, 2005

Carla A. Peterson

Carla A. Peterson
Administrative Law Judge