UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

H.B. by and through his Guardian Ad Litem P.B; P.B.,

Plaintiffs,

vs.

LAS VIRGENES UNIFIED SCHOOL DISTRICT, ET AL.,

Defendants.

CV 04-8572 FMC (Ssx)

ORDER REVERSING DECISION OF HEARING OFFICER

ORDER FINDING MOOT DEFENDANTS' MOTION TO STRIKE

This matter is before the Court on Plaintiffs' Complaint for Violations of the Individuals with Disabilities Education Act and Defendants' Motion to Strike the Declaration of Alicia Elliott (docket no. 30). This matter has been fully briefed, and the Court has read and considered Plaintiffs' and Defendants' opening and reply briefs, in addition to the moving and opposition documents submitted in connection with the motion to strike. For the reasons and in the manner set forth below, the Court hereby **REVERSES** the decision of the Hearing Officer rendered in connection with this matter. The Court, finding the Motion to Strike moot, does not rule on

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it.

I. Background

H.B. is a twelve-year old boy who resides in the Defendant Las Virgenes Unified School District ("District"). H.B. suffers from autism. As part of his autism, H.B. has deficits in the areas of gross motor, fine motor, cognition, speech and language, social and emotional functioning, self-help skills, and behavior. H.B. is qualified as a disabled student under the Individuals with Disabilities Education Act ("IDEA") and California Education Code § 56030.5. Consequently, the District is required by IDEA and California law to provide Howard a free appropriate public education ("FAPE").

Currently, H.B. attends the Elliott Institute in La Crescenta, California, pursuant to a settlement agreement between Plaintiffs and Defendants and this Court's stay put order of March 16, 2005. On September 17, 2002, the parties agreed that H.B. would attend the Elliott Institute for the 2002-2003 school year. The agreement also provided for prospective and compensatory education services (such as speech and language services, occupational therapy services, and behavior intervention services) that would be provided to H.B. during the 2003-2004 school year and extended school year, in the event that Howard attended the Elliott Institute during the 2003-2004 school year.

During these years, H.B. underwent several assessments to measure his progress. On October 22, 2002, H.B.'s parents received notice that Dr. Diane Ashton would coordinate, collaborate, and participate in H.B.'s assessment. Dr. Ashton assessed H.B. over several days and generated an eleven-page report. However, in June 2003, the District, unsatisfied with the assessment,

expressed the need for further assessment. It was looking for an "accurate assessment" and believed that Dr. Ashton's assessment was inconsistent in reporting H.B.'s then present levels and abilities. H.B.'s parents objected to further assessment of H.B. They believed that the decision to re-assess H.B. was "unilateral" on the part of the District, and that the District selected an expert to assess H.B. solely for the purpose of "challenging the requests of parents." In other words, they believed the District did not want H.B. to attend the Elliott Institute any longer, and that the District's experts were hired to express the opinion that H.B. should attend a District school.

At an August 2003 meeting regarding H.B.'s Individualized Education Program ("IEP"), the District reiterated its desire for re-assessment of H.B.. It requested H.B.'s parents' permission to conduct additional assessments of H.B. H.B.'s parents refused. The IEP team also discussed transferring H.B. from the Elliott Institute to a special day class at Lupin Hill Elementary School ("Lupin Hill") within the District. The District believed that H.B. would have opportunities to interact with typical peers at Lupin Hill. H.B.'s parents expressed their desire that H.B. stay at the Elliott Institute. His parents felt that the District was unable to provide services for H.B. and that they could not place confidence in District personnel.[1] H.B.'s father stated that he believed the only reason the District wanted H.B. to attend a District school was because the services provided at the Elliott Institute were costly.

Eventually, after the District requested a due process hearing seeking an order allowing it to assess H.B., the parties entered into a settlement allowing further assessment of H.B. The District claimed that under the

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[1]The District has previously failed in providing services to H.B. Before he began to attend the Elliott Institute, H.B. was a student at Willow Elementary School in the District and evidently suffered from severe behavioral problems.

September 17, 2002 settlement agreement, it was not obligated to fully fund H.B.'s education at the Elliott Institute, and it ceased funding H.B.'s classroom time. Ultimately, H.B. stayed and was funded at the Elliott Institute during this time pursuant to a stay put order.

The additional assessments were conducted in May 2004. H.B.'s behavior assessment was conducted by Dr. Mitch Taubman of the Autism Partnership. He reviewed H.B.'s educational records, discussed H.B. with his mother, teachers and service-providers at the Elliott Institute, and observed H.B. at home, at school and during his receipt of related services. Dr. Betty Jo Freeman conducted H.B.'s psychological assessment. In conducting the assessment, she administered form assessment tools, conducted observations at the Elliott Institute and at home, interviewed H.B.'s mother, teachers and service-providers, and reviewed H.B.'s educational records. H.B.'s speech and language assessment, which included observations at the Elliott Institute and the administration of assessment tools, was conducted by speech and language pathologist Marian Peloquin. Additionally, H.B. was administered an academic assessment by Curran Cummings, a special education teacher at Lupin Hill, and an occupational therapy assessment by therapist Joy Marman Guillory.

On or about Friday, May 28, 2004, the District faxed to H.B.'s attorneys a copy of all the assessment reports. On June 1, 2004, the District faxed H.B.'s attorneys a copy of its proposed goals and objectives. On June 2, 2004, H.B.'s IEP team convened to review the recent assessments and to discuss his program for the 2004-2005 school year and extended school year.

At the meeting, they discussed the assessment of H.B. and potential goals and objectives. H.B.'s mother asked several questions during the

meeting, and those questions were answered. The District offered H.B. a placement at Lupin Hill, with five hours of supervision of H.B.'s "DTT/ABA" program[2] by a behavior support provider, one-to-one instructional aide support during his transition and, as needed during the remaining term of the IEP, ninety minutes per weeks of speech and language services, ninety minutes per week of occupational therapy services, sixty minutes per week of adaptive physical education, six consultations with a clinical psychologist, extended school year services, transportation services, and parent training and parent participation through "planning team meetings" occurring at least once per month and daily communication logs.

Additionally, the District offered a plan to transition H.B. from the Elliott Institute to Lupin Hill during the 2004 extended school year. For the first two weeks, H.B. would begin his day at Lupin Hill, attending from 8:00 am to 10:00 am, and then attend the Elliott Institute for the remainder of his day. For the next two weeks, he would attend Lupin Hill from 8:00 am to noon, and then the Elliott Institute for the remainder of the day. Then he would attend only Lupin Hill. He would be transported from Lupin Hill to the Elliott Institute in one of two ways: either his mother would drive him with the District reimbursing her for mileage, or the District would arrange for a taxicab with a District staff member to accompany H.B. The journey would be approximately 30 miles and take approximately an hour.

At the meeting, there was little discussion about why Lupin Hill was the appropriate placement for H.B. over the Elliott Institute. H.B.'s mother did not again raise her objection to H.B.'s placement in a school at the District and her preference for the Elliott Institute. Accordingly, the parties

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[2]DTT/ABA is a particular type of instruction for individuals with autism.

did not discuss the advantages of a District placement over placement at Elliott, and it is not clear why the District proposed H.B.'s transition away from the Elliott Institute and to Lupin Hill.

Following the meeting, the IEP team agreed that the Elliot Institute and H.B.'s parents could have until June 14 to review the goals and objectives as amended during the discussions at the IEP meeting. The team agreed that, if the Elliott Institute staff had any questions or concerns about the goals and objectives, they could notify the District of those questions or concerns during that time and another IEP meeting could be convened. No additional input was given. On June 4, 2004, a rosary service was held for one of H.B.'s teachers who had passed away, and on June 14, 2004, a memorial service was held. Personnel from the Elliot Institute did not have the opportunity to speak with H.B.'s parents regarding his IEP until June 20, 2004.

On June 4 and16, the District sent H.B.'s parents letters reiterating and clarifying the June 2 IEP offer to H.B. and requesting consent for the IEP. H.B.'s parents refused consent to the IEP. The District requested a special education due process hearing on June 22, 2004.

At the due process hearing, the Special Education Hearing Officer ("Hearing Officer") found that the District's IEP offer provided H.B. with a FAPE.

First, she found that the District had complied with the procedural requirements of the IDEA. Although Plaintiffs argued that the District had violated the procedural rule that the District provide them with a "formal, written offer of placement," the Hearing Officer disagreed.

Second, the Hearing Officer found that the District had complied

with the substantive requirements of the IDEA. She concluded that the assessments performed by experts from the District and H.B.'s parents reached similar and accurate conclusions regarding H.B.'s cognitive skills. Regarding H.B.'s behavior, she credited the District's witnesses on the question of whether H.B. would suffer regression if transferred from the Elliot Institute to Lupin Hill. She reasoned that because the District's witnesses were more familiar with the program at Lupin Hill, they were better able to determine if H.B. would transfer successfully into that program. Regarding academics, the Hearing Officer concluded that the parties generally agreed on H.B.'s current level of academic performance, and that he faced difficulty with generalizing the skills he learned. Regarding speech and language, the District's general description of H.B.'s speech and language skills was undisputed. There was a dispute regarding whether H.B. had apraxia,[3] but the Hearing Officer credited the testimony from the District on this issue that he did not. There was no substantial dispute concerning H.B.'s social/emotional functioning, gross motor abilities, fine motor abilities, or self-help skills.

Given the accurate and largely undisputed assessment of H.B.'s special needs, the Hearing Officer concluded that the District's IEP offer, as required by the IDEA, was reasonably calculated to provide H.B. with educational benefit. The Hearing Officer rejected Plaintiffs' argument that the goals and objectives in the proposed IEP inappropriately identified H.B's current level of performance. She also concluded that the goals were not overly focused on "functional skills" curriculum. She reasoned that one

[3]Apraxia is a problem in which the nerves in the brain have difficulty sequencing information and in which the muscles of the body are slow to react to the information received.

purpose of the IDEA was to prepare students for independent living, and the goals and objectives geared toward H.B.'s development of independent use of functional skills were appropriate. She also reasoned that the skills were sufficiently challenging academically for H.B. The Hearing Officer rejected Plaintiffs' challenge that the goals and objectives were overly optimistic and unintelligible. The Hearing Officer was satisfied that H.B.'s proposed teacher, Ms. Cummings, understood the goals and had a clear vision of how to implement them. Finally, the Hearing Officer rejected Plaintiffs' argument that the goals and objectives were not written to be implemented at home and in the community. Although there is no legal requirement that goals be so written, the goals and objectives proposed were transferable to home and community environments.

The Hearing Officer also concluded that placement at Lupin Hill was appropriate. Plaintiffs argued that because H.B. suffers from severe behavior problems, the Elliot Institute was more appropriate. However, the Hearing Officer credited the testimony from Ms. Cummings that she understood how to implement H.B.'s behavior plan. Plaintiffs also argued that Lupin Hill did not offer sufficient individualized attention, but the Hearing Officer disagreed. The program at Lupin Hill would provide H.B. with one-on-one instruction and a smaller student-teacher ratio than available at the Elliott Institute.

Next, the Hearing Officer concluded that H.B.'s parents were sufficiently involved in the proposed IEP. H.B.'s parents argued that the IEP did not provide sufficient involvement and failed to "rebuild trust between [H.B.'s] family and the District." The Hearing Officer found that the plan called for substantial parental involvement, including regular

planning team meetings, parent training, and a parent/school communication log. Additionally, the Hearing Officer found that Plaintiffs had failed to (1) identify how parent trust could be rebuilt; (2) that the law required the District to attempt to rebuild trust; or (3) that failure to rebuild trust would result in the denial of a FAPE for H.B. The Hearing Officer nevertheless concluded that "the District is approaching [H.B.'s parents] with openness and is attempting to rebuild the trust between the parties."

The Hearing Officer found that the proposed IEP could be implemented. Plaintiffs argue that Dr. Elliott, of the Elliot Institute, told H.B.'s mother that the Elliot Institute would not allow H.B. to enroll part time for purposes of implementing the transition plan. Concluding that this testimony was hearsay, the Hearing Officer did not credit it. The Hearing Officer concluded that otherwise, there was no evidence that H.B. could not attend the Elliott Institute part time. Plaintiffs have now submitted a declaration from Dr. Elliott, again stating that she would not admit H.B. part time. She explains that there are limited spaces available for students at the Elliott Institute, and that each space should go to a full-time student at the beginning of the year. Any other arrangement would be disruptive to the students. That declaration is the subject of Defendants' motion to strike.

Plaintiffs brought the instant complaint following the due process hearing on October 18, 2004. Plaintiffs argue that the Hearing Officer's decision was in error, and that the proposed IEP fails to comply procedurally and substantively with the IDEA. They also argue that the IEP cannot be implemented.

II. Standard of Review

Under the IDEA, a district court "shall receive the records of the

administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." *Ojai Unified School Dist. v. Jackson*, 4 F.3d 1467, 1471 (9th Cir. 1993). Thus, judicial review of IDEA cases is less deferential to the agency decision than judicial review of agency actions in other contexts. *Id.* Nevertheless, in "reviewing administrative decisions, 'courts must give due weight' to judgments of education policy." *Id.* at 1472 (quoting *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1311 (9th Cir. 1987)). While courts should not substitute their own judgment for that of the administrative agency, how much deference is due the agency decision is a matter of discretion. *Id.* at 1472-73; *see also Bd. of Education of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982). To determine how much weight should be given,

> [t]he traditional test of findings being supported by substantial evidence, or even a preponderance of the evidence, does not apply. This does not mean, however, that the findings can be ignored. The court, in recognition of the expertise of the administrative agency, must consider the findings carefully and endeavor to respond to the hearing officer's resolution of each material issue. After such consideration, the court is free to accept or reject the findings in part or in whole.

Id. at 1473 (quoting *Gregory K.*, 811 F.2d at 1311). Courts give the hearing officer's findings more deference when they are "thorough and careful." *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 891 (9th Cir. 1995). Courts are not permitted simply to ignore the administrative findings. *Ojai*, 4 F.3d at 1472.f

III. Discussion

The IDEA ensures that all disabled children receive a free appropriate public education ("FAPE") through IEPs. *See* 20 U.S.C. § 1400(c); *W.G. v. Bd. of Trustee of Target Range Sch. Dist.*, 960 F.2d 1479, 1483 (9th Cir. 1992). "The IEP, which is prepared at a meeting between a qualified representative of the local educational agency, the child's teacher, the child's parents or guardian, and where appropriate, the child, consists of a written document containing" (1) a statement of the child's present levels of performance; (2) a statement of annual goals and short term objectives; (3) a statement of the services to be provided to the child; (4) the projected date for the initiation and duration of the services; (5) a statement describing how the child's progress will be evaluated. *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 182 (1982).

Substantively, the IDEA requires the State to "provide educational benefit to the handicapped child." *Id.* at 201. The education provided need not maximize the potential of the child or "produce any particular outcome." *Id.* at 192. "Congress did not impose upon the States any greater substantial educational standard than would be necessary to make" access to public schools "meaningful." *Id.* Rather, the "education to which access is provided [must] be sufficient to confer some educational benefit upon the handicapped child." *Id.* at 200. Therefore, IEP should be designed to confer such a benefit, and education the child actually receives should comport with the IEP. *See Rowley*, 458 U.S. at 188; 20 U.S.C. § 1401(18).

In addition to the substantive requirements, the IDEA imposes "extensive procedural requirements upon States receiving federal funds under its provisions." *Id.* Among those procedural requirements is the

requirement that parents be allowed meaningful input into the development of the IEP. *W.G.*, 960 F.2d at 1483-1484.

> Procedural flaws do not automatically require a finding of a denial of a FAPE. However, procedural inadequacies that result in the loss of educational opportunity or seriously infringe the parents' opportunity to participate in the IEP formulation process clearly result in the denial of a FAPE.

Id. at 1484 (citations omitted). In determining whether a child has been provided with a FAPE, courts consider first whether the district has complied with the procedural requirements of the IDEA and then whether it has complied with the substantive requirements that the "individualized education program developed through the [IDEA's] procedures [was] reasonably calculated to enable the child to receive educational benefits." *Amanda J. v. Clark Cty. Sch. Dist.*, 267 F.3d 877, 890 (9th Cir. 2001).

Plaintiffs argue that H.B. is being denied a FAPE because his parents were not given the opportunity to meaningfully participate in the development if his IEP. Specifically, they argue that H.B.'s placement was predetermined by the District to be Lupin Hill, as opposed to their preferred placement at the Elliott Institute. In *W.G.*, the court held that when the district assumes a "take it or leave it" posture at an IEP meeting and "no alternatives" to the district-proposed program are discussed," a child may be denied a FAPE. *W.G.*, 960 F.2d at 1484. If a district rejects or plans to reject an alternative presented by the parents "regardless of any evidence concerning [the student's] individual needs and the effectiveness of" the program, this too may result in a procedural violation. *Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 857 (6th Cir. 2005).

In *Deal*, the court held that the district had an "unofficial policy of refusing" the type of instruction the parents requested. The parents requested "Lovaas style ABA" services for their son, who suffered from autism. There was evidence that such instruction would benefit the student. However, the school officials refused to consider it. They told the parents that they would like to give the student the requested service, but that they could not because they "could not give the same to everybody." *Id.* at 855. They had consistently refused to provide Lovaas style ABA services to other students in the district, rejected the validity of the studies showing that type of instruction to be effective, told the parents they could not ask questions during the IEP meeting; investigated the parents' dispute with the IEP without interviewing any Lovaas style ABA teachers; and denied the request for Lovaas style ABA in part because they believed it to be a more expensive approach. *Id.* Further, the school officials had described the student's private school program as a "sensitive case with regards to school program and/or Lovaas," informed the parents that the "powers that be" were not implementing Lovaas style ABA programs, and stated at the student's IEP meeting that they "wished people would pay their taxes so that [the district] could provide ABA" for the student. Based on this and other evidence, the court concluded that the parents' participation in the IEP process was not meaningful. The court reasoned, "[t]he district court erred in assuming that merely because the Deals were present and spoke at the various IEP meetings, they were afforded an adequate opportunity to participate. Participation must be more than mere form; it must be *meaningful*." *Id.* at 858. Just because the parents contributed to the descriptions of the student's then present levels of performance and the stated goals and objectives did

not make the participation meaningful, if they did not contribute to "the operative portions of the IEP." *Id.* Their opinions were not considered in determining what services would be provided for the student. *Id.*

Here, Plaintiffs point to substantial evidence that the District intended, from the time H.B. was placed at the Elliott Institute, to transfer him back to the district. At an IEP meeting held in October, 2001, shortly after H.B. began at the Elliott Institute, it was noted, "The IEP team agrees to reconvene in April 2002 to discuss a transition plan back to District" and "IEP team agrees to an observation at home and school in order to provide a beginning of transition planning to return [H.B.] to District Program." This was despite the progress H.B. had made while at the Elliott Institute and ther recognition that private school placement had been necessary.

On August 20, 2003, at another IEP meeting, the expert with whom the District had contracted to assess H.B.[4] discussed the need for a "transition plan" to the District. H.B.'s parents articulated their concern that the District could not provide appropriate services to H.B., but the notes from the IEP meeting do not indicate how the District responded to this concern. The special day class at Lupin Hill was suggested at that meeting.

Shortly thereafter, the District refused to continue fully funding H.B.'s education at the Elliott Institute. H.B. was permitted to stay at the Elliott Institute, despite the District's apparent bias against such a placement, only because H.B.'s parents sought a stay put order.

Later, when the parties could not agree on the IEP at issue in this case, and Plaintiffs again sought a stay put order, the District submitted a

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[4]This need for this assessment, as explained above, was strongly disputed by H.B.'s parents. They believed that the District wished to assess H.B. solely to build a case for transferring him from the Elliott Institute.

declaration to this Court in which one of its representatives stated, "there was a clear understanding that, at the end of . . .two years, [H.B.] would return to the District," and that the "District never agreed that the Elliott Institute was an appropriate placement for" H.B. The District contended that under the settlement agreement that placed H.B. at the Elliott Institute, "the District would propose an IEP for [H.B.] *with the purpose* of bringing him back to the District" (emphasis added). In another declaration, the District stated that under the terms of the settlement agreement, "the District was to re-evaluate [H.B.] and propose an IEP for his return to the District. As a consequence, the District brought in internationally recognized experts in assessing and educating children with autism."

At the IEP meeting of June 24, 2004–the meeting at which the IEP at issue in this case was developed–that H.B. would be transferred to the District was assumed, and alternatives were not even discussed. From the beginning, District personnel noted that the IEP team would "talk about a transition plan." After discussing the goals and objectives, H.B.'s mother asked, "Who would implement this plan?" Mitch Taubman, an expert for the District who assessed H.B. answered, "I'm not sure we're yet talking about the where and when." Dr. Freeman answered, "[t]he bottom line would be everybody would be implementing it all."[5] Dr. Taubman then added, "Some of this is not that dissimilar to the kind of plan that we have working in places already and one of those places is Curran's classroom." Curran Cummings is the proposed teacher for H.B. at Lupin Hill.

After discussing the goals and objectives, Ms. Schillinger, a

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[5]Although this statement is vague, Dr. Freeman was evidently referring to the personnel present at the IEP meeting, most of whom were District personnel.

representative of the District, stated

> [W]hat we'll do next is talk about how we're going to have [H.B.] meet these goals and objectives. When we do that we talk about looking at general education and could we meet those goals and objectives in general education? Do we need to have some supports coming in? Should he come out for a certain period of time? We'll kind of walk through that discussion and see what our placement recommendation would be.

Almost immediately the discussion turned to Ms. Cummings's special day class in the District. She was present at the meeting and acted as one of H.B.'s assessors. No other alternatives were discussed. The option of keeping H.B. at the Elliott Intitute was not discussed. After discussing each of the components of the IEP and how they would be implemented (through the District), Ms. Schillinger stated, "then the next piece we would be talking about a transition time. Where we would be looking at transitioning him from Elliott to our program . . ."

From the time H.B. attended the Elliott Institute, it was clear that the District intended to transfer him to the District (regardless of whether the District's program was suitable to meet his individual needs). Allowing him to stay at the Elliott Institute was not considered (regardless of the amount of progress made or whether it was best suited to meet his individual needs). It was clear to the District that H.B.'s parents desired for him to stay at the Elliott Institute. At the IEP meeting of August 20, his parents expressed their concern that the District was unable to provide H.B. with a FAPE. However, there is no evidence that H.B's parents' concerns were ever addressed. There is no evidence in the record wherein the IEP team

discussed the comparative strengths or weaknesses of the Elliott Institute or Lupin Hill or addressed whether the Elliott Institute would be capable of implementing the proposed IEP. Rather, as the District admits in its responding brief, it was "well-understood" that H.B. would not be permitted to stay at the Elliott Institute. The District's determination to remove H.B. from the Elliott Institute and place him in a public program does not evidence the sort of open-mindedness that is necessary to comply with the IDEA. As in *Deal*, the District was fully aware of the parents' wishes and yet failed to address them in any meaningful way.

The District argues that it may "prepare reports and come with pre-formed opinions regarding the best course of action for the child as long as [it is] willing to listen to the parents and parents have an opportunity to make objections and suggestions." *N.L. v. Knox County Schools*, 315 F.3d 688, 694 (6th Cir. 2003). In other words, the District argues that it was not required to attend the IEP meeting with no preconceptions as to the proper placement for H.B. However, the evidence shows that the District did far more than prepare reports or form opinions. It shows that over a course of several years, the District assumed that H.B.'s placement would be within the District. The District understood the *purpose* of H.B.'s IEP was to transfer him to the District. There is no evidence they were willing to listen to H.B.'s parents regarding their desire to keep him at the Elliott Institute.

The District further argues that H.B.'s mother participated in the IEP meeting, that she asked questions and made suggestions. It is true that H.B.'s mother sought further information regarding the goals and objectives, and that District personnel and experts attempted to explain the goals and objectives clearly. However, H.B.'s mother provided no input on H.B.'s

placement, and the transcript of the IEP meeting shows that no one asked for H.B.'s mother's input on his placement. H.B.'s mother did not volunteer her position. However, by the time the June 24, 2004 IEP meeting occurred, H.B.'s parents had expressed their lack of confidence in the District on prior occasions. They had twice sought stay put orders when the District disputed its obligation to fund H.B.'s education at the Elliott Institute. H.B.'s mother's position was known. Further expression of her desire to keep H.B. at the Elliott Institute, after years of litigation and IEP meetings in which the District confidently declared that H.B.'s next IEP would transfer him to the District, would have been futile. As the court explained in *Deal*, simply having a parent present at and IEP meeting and participating in the development of goals and objectives is not meaningful if the parent is excluded from participation in the decision as to "operative" portions of the IEP. H.B.'s parents were excluded from participation in development of the "operative" portions of H.B.'s IEP: they were excluded from deciding who would teach H.B. and where. Although H.B.'s mother was present at the IEP meeting when these matters were discussed, her input was neither sought nor given. No serious consideration was given to H.B.'s parents position regarding the proper placement of their son.

The Court finds by a preponderance of the evidence that H.B.'s placement was predetermined, and accordingly, the procedural requirements of the IDEA were violated. The Hearing Officer did not address this particular argument (or it was not raised), so there is no amount of deference the Court need give to the Hearing Officer's opinion on this matter. Because the Court finds there was a procedural violation, it need not consider whether the proposed IEP is substantively appropriate. The decision of the

Hearing Officer is reversed.

IV. Conclusion

The decision of the Hearing Officer is reversed. The Court does not rule on the Motion to Strike because it is moot.

August 18, 2005

FLORENCE-MARIE COOPER, JUDGE
UNITED STATES DISTRICT COURT