

DELAWARE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING PANEL

[PARENTS]
Parents of Student

[STUDENT]
Petitioner

v. DE DP 08-7

SEAFORD
School District
Respondent

OPINION AND ORDER OF THE DUE PROCESS HEARING PANEL

Date of Petitioner's Application: October 29, 2007

Original Hearing Date: March 5, 2008

Date of Hearing: March 5, 2008

Submitted: March 7, 2008

Decided: April 21, 2008

For Petitioner: Patricia O'Neill
For Respondent: Roger Akin
Panel: Laraine A. Ryan, Esquire
Dr. Doris Eason
Marcia DeWitt

SUMMARY OF HEARING DISPUTE

Whether the appropriate placement for student is the District Autistic Program (DAP) or Sussex Consortium (Consortium).

STATEMENT OF DISTRICT POSITION AND MAJOR POINTS PRESENTED

That DAP can provide a FAPE for the Student.

STATEMENT OF PARENT POSITION AND MAJOR POINTS PRESENTED

That DAP cannot provide a FAPE for the Student and that Consortium is the proper placement for Student.

FINDINGS OF FACT

Student was born prematurely in 2004. However, he developed normally, until at 18-24 months, when Parents noticed a delay in speech development. Student's pediatrician referred Student to Child Development Watch, where Student received speech and language therapy twice per week for 25 minutes.

When it was time to make the transition to school at Student's third birthday, student began to attend the pre-school at [Elementary School]. The Seaford School District (SSD) does not have pre-school program for typical pre-schoolers. The pre-school at [Elementary School] is for special education pre-school students.

On March 9, 2007, the District requested parental permission to evaluate the Student for eligibility under the IDEA. The Student was identified as eligible for special education.

An IEP for speech and language development was created, dated March 9, to cover the period from March 9, 2007 to April 18, 2007.

On April 20, 2007, the School Psychologist examined Student for evaluation. The School Psychologist made a diagnosis of autism; however, SP did not complete the report in written form immediately.

The Speech and Language Pathologist evaluated Student on April 24, 2007 and May 2, 2007. The Occupational Therapist evaluated the Student on July 11, 18 and 25, 2007.

On May 18, 2007, there was an eligibility meeting. Mother had in the meantime done her own research on autism and was already aware that the Consortium offered an Autistic Program. At some point near Memorial Day, Parents visited the Consortium and received a tour from a psychologist who worked

there. They observed two classrooms, one for two to four year olds and another for four to five year olds. They noted that there is a private day care in the same building, on the same floor and hall as these two classrooms, and the parents learned that the autistic class did have contact with these typical peers. They observed the students in the autistic program to be playing with each other and the professionals to be making frequent notes. They observed a whole class to walk by with their PECS (Picture and Exchange Communication System), and some of these students greeted them.

Mother had learned that the years from age two to five are crucial for autistic students, and, concerned that they had already lost one year, enrolled Student in a summer school program in DAP, held at [Elementary School]. However, at the meeting for the initial IEP on June 13, 2007, Parents made clear that they wanted a placement at Consortium to be considered. The IEP was marked at being for the period from July 2, 2007 through June 8, 2008. Parents signed IEP on page 7, indicating consent to the program for the time being.

Student attended the summer program, and made progress. He learned to use PECS, but parents never received training in the PECS.

The DAP had not fully developed the Parent Services piece of its autistic program. Parents have not received parent education services. There was a respite program available; it is up to parents whether or not they use it.

The Consortium was originally the autistic program for all Sussex County school districts. Each county had its central autistic program. The Delaware Autistic Program then undertook a policy of returning autistic students to their home districts, and made a start on this by initiating an autistic program in one district in each county. Seaford School District was the chosen district for Sussex County, and the DAP began. Thus, if a student lives in the Seaford School District, the autistic program is in the home district. If the student lives in any other Sussex County School District, then the autistic program is at the Consortium.

School District took the position that though Parents preferred the Consortium, it was not an option to be considered so long as DAP could offer Student a FAPE.

Parents had a meeting with Director of Special Services (DSS) on July 6, 2007. At this meeting, DSS told parents that SSD had the first opportunity to educate Student, and that he and the rest of the IEP team

agreed that DAP was capable of providing FAPE to Student. DSS left parents with the impression that it was his decision as to where the IEP would be implemented. DSS said that if Student had no dangerous behaviors, he must stay in the DAP. This was the policy of the DAP.

Parents disagreed, because of their tour of the Consortium, and their observations of the DAP over the summer. Parents were concerned about:

- Not having the psychological report and having to request that it be completed before a doctor's appointment and being advised that it was customary for the reports not to be completed until the new school year;
- The School Psychologist had used an incorrect form in evaluating Student; using sections for older students rather than Student's actual age;
- A case of elopement from the DAP;
- A change in one of the Student's goals made without Parents' consent;
- Not providing the parents with symbol cards for the PECS;
- Staff not using Student's Activity Schedule and some staff not have access to Student's IEP.

These concerns were summarized in a letter of September 6, 2007 from Mother to DSS, along with another request to place student at the Consortium.

DSS responded by letter of October 16, 2007 that the "school district does not agree that a change in placement was warranted.

Parents requested an IEP meeting at the beginning of the new school year. This meeting was held to revise the IEP. The meeting date was September 7, 2007. Again, Parents said that they wanted placement at the Consortium. The Director of DAP attended this meeting.

Another IEP revision meeting was held on October 11, 2007. Counsel for each side were present at the meeting. This meeting also included the Director of DAP and in addition, the SSD had invited the Principal of the Consortium to the meeting.

Again re-iterating their desire for Student's placement to be changed to the Consortium, the Principal of the Consortium mentioned the transportation issue – that it would be a relatively long trip for Student attending school at the Consortium. Also, at this meeting, the Principal of the Consortium reviewed Student's

IEP, apparently without Parents' consent and knowledge that they could object to this, and that further, they could object to Principal's presence at the meeting. Father made a comment in anger at the meeting regarding the expenditure of funds for attorney's fees. At a later time, Mother overheard someone in a store discussing that comment, and from this Parents deduce that someone at the meeting breach confidentiality.

The School Psychologist had completed the report after requests from the parents in July, 2007. The diagnosis was autism. The SP recommended that Student be placed in a program highly specialized in the use of currently established best practices for students with autism

The IEP team is in apparent unanimous agreement that Student, being verbal, would benefit from contact with verbal peers. However, there were only five children in Student's classroom at [Elementary School], and there were no verbal peers, that is, peers that spoke, in the classroom when Student was there. There is no pre-school at [Elementary School], and therefore no same-age typical peers. There were no verbal children in Student's class.

Student's only contact with verbal children was at lunch, where the children were older, being kindergarteners. Even then, Student's contacts were limited to two children, one his sister and another is his aunt's stepson, both children he knew outside the school setting.

There is a private pre-school at the Consortium. Though it is private, it is housed in the same building. The pre-school is for nondisabled children. These children interact with the students in the autistic program.

The IEP team was in agreement that as a high functioning verbal autistic Student, contact with verbal peers or typical peers was essential for modeling behavior, and research supports this. According to DSS, this could be accomplished by "reverse mainstreaming," but there was no plan for that and no goal for that in the IEP or any revision thereof.

It was also considered desirable for the Student to go on outings – trips off the school premises. The DAP has not defined a program for this. It does some outings, but not regularly. The Consortium has outings on a regular basis.

Parent Services and Education are a part of teaching an autistic student. The DAP did not yet have this aspect fully set up and is still working on it.

When it was clear that the IEP team did not agree on the placement, Parents filed a Due Process

Hearing Request on October 29, 2007, requesting placement at the Consortium, compensatory education and other relief.

MAJOR POINTS OF LAW RELATED TO THE CASE

The School District must prove, by a preponderance of the evidence that it has provided the student with a free and appropriate public education. If the Due Process Hearing Panel cannot determine that it was more likely than not that the School District provided the student with a free and appropriate public education, it must decide in favor of the Petitioner. *Kruelle v. New Castle County Board of Education*, 642 F.2d 687, 692 (3rd Cir. 1981); 20 USC § 1415(e)(2).

Adequacy of an Individualized Education Plan must be determined with regard to the circumstances existing at the time it was written. *Fuhrman v. East Hanover Board of Education*, 993 F.2d 1031 (3rd Cir. 1993).

FAPE is defined as: “[S]pecial education that is specially designed instruction including classroom instruction, instruction in physical education, home instruction and instruction in hospitals and institutions, and related services as defined by the Department of Education rules and regulations approved by the State Board of Education and as may be required to assist a handicapped person to benefit from an education that:

1. Is provided at public expense, under public supervision and direction and without charge in the public school system;
2. Meets the standards of the Department of Education as set forth in this title or in the rules and regulations of the Department as approved by the State Board;
3. Includes elementary, secondary or vocational education in the State; and
4. Is individualized to meet the unique needs of the handicapped person.” 14 Del. C. § 3010(3);

The federal statute includes “preschool” in the listing of types of schools and the fourth section is “(4) are provided in conformity with the student’s individualized education program required under section 614(d). 10 U.S.C. § 1401(9)(2004).

In determining whether FAPE was provided, the court must determine whether the school district followed procedural safeguards of IDEA, and whether the school district developed an IEP reasonably

calculated to provide educational benefit. The school district does not have to provide the maximum possible benefit. *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). Individualized educational programs under IDEA must provide significant learning and confer meaningful benefit. *Ridgewood Bd. of Educ. v. N.E.*, 172 F. 3d 238 (3d Cir. 1999). In *Ridgewood*, the Third Circuit held that an IEP must provide significant learning and confer meaningful benefit, and that benefit must be gauged in relation to the child's potential.

The benefit must be more than a *de minimus one*. The IEP must provide significant learning and significant benefit. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 180-84 (3rd Cir. 1988).

In the present case, parents are not seeking tuition reimbursement for a private placement. They are seeking a different public placement.

“Each school district and other state agencies responsible for the care of Delaware citizens shall provide and maintain, under appropriate regulations of the Department of Education approved by the State Board of Education, special classes and facilities to meet the needs of disabled persons as herein defined and recommended for special education or training who are residents of any geographical area within the State and who can be served by such special classes and facilities. This and other sections of this chapter and this title may be carried out by assigning children who are residents of 1 school district to attend classes in facilities of another school district according to Chapter 6 of this title concerning tuitions.” 14 *Del. C.* § 3121.

The education must take place in the Least Restrictive Environment. “The least restrictive environment is the one that, to the greatest extent possible, satisfactorily educates disabled children together with children who are not disabled, in the same school the disabled child would attend if the child were not disabled. *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 535 (3d Cir.; 1995).

First, the Court must determine “whether education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily.” *Oberti v. Bd. of Educ. of the Borough of Clementon School District*, 995 F.2d 1204, 1215 (3rd Cir. 1993). This cannot be the case for a Student who is to be placed in a program highly specialized in the use of currently established best practices for students with autism. There is no pre-school for non-disabled students in the SSD, making it impossible in any event.

If the Court finds that placement outside of a regular classroom is necessary for the child's educational benefit, it must evaluate whether the school has mainstreamed the child to the maximum extent appropriate and made efforts to include the child in school programs with nondisabled children whenever possible." *Oberti*, supra, at 1215.

There is a broad scope of relief available under the IDEA. Under the IDEA, when a state or local government agency fails to provide adequate services for a child, the court "shall grant such relief as the court determines is appropriate." 20 U.S.C. §1439(a)(1). The Supreme Court addressed the meaning of "appropriate" relief in *School Committee of Burlington v. Massachusetts Department of Education*, 471 U.S. 359 (1985). In particular, the Court explained: "The statute directs the court to 'grant such relief as [it] determines is appropriate.' The ordinary meaning of these words confers broad discretion on the court, and the type of relief is not further specified, except that it must be 'appropriate.'" *Burlington*, 471 U.S. at 369. As the Third Circuit has further explained: "[W]e discern nothing in the text or history suggesting that relief under IDEA is limited in any way, and certainly no 'clear direction' sufficient to rebut the presumption that all relief is available. The expansive language of § 1415(f) . . . contains no restrictions on forms of relief." *W.B. v. Matula*, 67 F.3d 484, 494 (3d Cir. 1995).

STATEMENT OF PANEL'S DECISION IN CLEAR AND CONCISE LANGUAGE

Student's placement is changed to the Consortium. Student is awarded compensatory education:

1. Student to receive instruction at the Summer Program at the Consortium.
2. Speech and language therapy three times per week during the summer.
3. Parents to be given PECs training starting immediately and going into the summer if needed. This training to take place two times per week for 45 minute sessions; one session at home and one session at school. Parents must be taught what to do when child refuses the exchange process, including how to find the best motivators. The total amount of the training should be up to 20 hours, to the point where the parents are using it independently.
4. Extended School Year services must be checked yes on the IEP.
5. Speech and language during the school year: three times per week for the 2008-2009 school year. This may be two periods of integrated speech and one period of one-on-one in office speech.

DISCUSSION OF PANEL'S RATIONALE, IF NOT PREVIOUSLY MENTIONED

The SD argues that the DAP is the default placement and that so long as it provides a FAPE, no other placement can be made. The SD argues that it can maintain a standard for placement at the Consortium: that is, that if the student does not exhibit dangerous behaviors, the student cannot be placed at the Consortium. This standard does not take into account that each IEP must be tailored to the student's unique needs and that the child's placement must be in line with his or her unique needs educationally. The "dangerous behavior" criterion is overly general and programmatic and does not account for the unique needs of any student. A pre-school autistic child who does not exhibit dangerous behaviors is still in need of interaction with verbal peers.

Further, the Consortium is not a program specialized for students with dangerous behaviors; it is for autistic students from all other Sussex County Districts. Those students do not necessarily have dangerous behaviors, and are placed at the Consortium whether they have dangerous behaviors or not.

School District argues that the Consortium is a More Restrictive Environment than DAP, because DAP is in the same building with typical students and the regular school setting, whereas the Consortium is a setting with only Special Education Students. But since the Student needs access to age appropriate verbal peers, it is more relevant to Student's situation that the DAP does not have this, making it the More Restrictive Environment in Student's case. The other autistic students who are verbal who are at Consortium thus make it a less restrictive environment for Student. Though the private pre-school merely shares the building, there is access to the typical peers there, where there is none at the DAP. This access is not part of the IEP and was never included therein.

The DAP does not have a functioning Parent Services Program. The Consortium has this essential element of an autism program.

Given the importance of the pre-school years for an autistic student, and that a highly verbal autistic student needs to learn the "modeling behavior" from verbal autistic peers and nondisabled peers, Student should be placed where he will have that access when the placement is within the public schools system's statewide ability to provide.

NOTICE OF APPEAL RIGHTS

Any party aggrieved by the decision of the hearing panel may file a civil action in the Family Court. Such proceeding shall be initiated by the filing of a complaint within 90 days of the date of the decision. 14 *Del. C.* § 3142(a).

DATED: _____ Laraine A. Ryan, Panel Chairperson

DATED: _____ Doris Eason, PhD, Educator

DATED: _____ Marcia DeWitt, Layperson