

DELAWARE DEPARTMENT OF EDUCATION SPECIAL EDUCATION DUE
PROCESS HEARING PANEL

In the Matter of
XXXXXXX,
Petitioner,

DE DP No. 05-10

HEARING DECISION AND ORDER

v

Hearing Dates:

*APPOQUINIMINK SCHOOL DISTRICT,
AND THE DELAWARE DEPARTMENT
OF EDUCATION,*

January 5, 2005

January 6, 2005

January 7, 2005

Respondents:

Parents:

Mr. and Mrs. H0sva0JXXXXXXXXXXXX
XXXXXXXXXXXX
XXXXXXXX, DE 19XXX

Counsel for Parent:

Neil Lapinski, Esquire
Swartz Campbell
300 Delaware Avenue, Suite 1130
P.O. Box 19899
Wilmington, DE 19899

Counsel for District:

Michael Stafford, Esquire
Young Conaway Stargatt & Taylor, LLP
The Brandywine Building
1000 West Street, 17th Floor
Wilmington, DE 19801

Counsel for the Delaware Department of
Education:

Louann Vari, Esquire
Department of Justice
102 W. Water Street
Dover, DE 19904

Panel Members:

Patricia M. O'Neill, Esquire, Chairperson
Dr. Corinne Vinopol, Educator Delegate
Ms. Judith Mellen, Lay Person Delegate

NATURE AND STAGE OF PROCEEDINGS

Petitioners, through counsel, submitted an application for a hearing to the Delaware Department of Education, dated November 22, 2004, alleging multiple violations of special education law. Petitioners named the Appoquinimink School District (hereinafter "District") as Respondents.

A Motion to join the Delaware Department of Education (hereinafter "DOE") was submitted by the District on December 2, 2004 and opposed by Petitioners. Both the Petitioner and the District submitted Memoranda of Law on the issue, and after discussion, the Panel granted the District's request to join the DOE as a party.

Hearings were convened on January 5, 6, and 7, 2005. The resulting record included a lengthy transcript of 963 pages and documentary evidence of 562 pages. Two stipulations were received during the hearing. Written post hearing arguments were submitted by the District and the Petitioners. The POE joined with the District's written submission. One request for an extension of time was received on behalf of the Petitioners and granted with consent of counsel.

This is the Panel's decision on the merits.

ISSUES

At the outset of this decision, this panel wants it to be made clear that despite requests that the Petitioners provide to the District, the DOE, and this panel a detailed list of issues in dispute, none were provided. Alternatively, Petitioners were advised by this panel that a list was to be included in his closing. Again, no issue(s) were specifically identified. Petitioners claim that their approach was a 'kitchen sink' approach to the issues. This, however, is not in accordance with IDEA regulation 300.507 (c) (2) (i-iv). Accordingly, the panel identified the issues for the Petitioners.

The panel gleaned two issues from the Petitioner's hearing request:

1. Whether the IEP for school year 2003-2004 provided the student with meaningful educational benefit;
2. Whether the proposed IEP for school year 2004-2005 is reasonably calculated to provide the student With meaningful educational benefit and whether the proposed placement was appropriate?

The Petitioners did not place the accommodations on the IEPs at issue.

PETITIONER'S POSITION

XXXXX (hereinafter "Student") was unilaterally placed in a private school by his parents (hereinafter "Petitioners") in September 2004. The Petitioners justify removal from the District program based on multiple violations of the special education law.

The parties agree that the material time in dispute encompasses the 2003-2004 school year, and the 2004-2005 school year until the time of the hearing determination. The parties stipulated that the student's present private school placement is an appropriate placement and that the accommodations contained within both the 2003-2004 and 2004-2005 Individualized Educational Programs (IEP) were not at issue.

The Petitioners contend that the IEP for the school year 2003-2004 contained goals and objective which did not address the student's needs. In addition, the IEP failed to include related services and use appropriate methodologies. This resulted in a denial of F APE.

The Petitioners further claim that the IEP for school year 2004-2005 was not reasonably calculated to provide meaningful education benefit and the placement for school year 2004-2005 was inappropriate.

The Petitioners requested the following relief: extension of the student's entitlement to special education services by one year, reimbursement of tuition for the student's Lindamood Bell Program and reimbursement of tuition for the student's private school placement at the Vanguard School.

DISTRICT'S POSITION

The District denies the above contentions. The District asserts that it provided a free, appropriate, public education (FAPE), specifically it provided appropriate goals and objectives and the student received required related service, during the 2003-2004 school year.

Further, the District contends that the proposed IEP for 2004-2005 school year was reasonably calculated to provide meaningful educational progress and that the placement was appropriate.

The District disputes the student's eligibility for an extension of entitlement of services or any tuition reimbursement.

DOE'S POSITION

The DOE likewise disputes Student's eligibility for extension of entitlement of services or any tuition reimbursement. It joins in the arguments provided by the District.

BACKGROUND: PLACEMENT HISTORY

The student was born on September 3, 1991. He was first identified as an eligible child under the Individuals with Disabilities Education Act (IDEA) in the first grade while a student in the Christina School District. The student attended school in the Christina School District with an IEP until he transferred to the Appoquinimink School District in the fifth grade, where he attended Olive B. Loss Elementary School.

The student's IEP, dated May 7, 2003 for school year 2003-2004, is essentially the student's sixth grade IEP. He attended sixth grade at Everett Meredith Middle School. The IEP for sixth grade was revisited for clarification on June 17, 2003. It was modified on August 25, 2003 and again on November 10, 2003.

The proposed IEP for seventh grade was written on August 25, 2004 after receipt of the Independent Educational Evaluation performed by Dr. Margaret Kay. However, the Petitioners unilaterally placed the student in the Vanguard School, a nonpublic special education program, for the seventh grade after sending the District a ten-day notice.

DECISION

Issue 1. Whether the IEP for school year 2003-2004 provided the student with meaningful educational benefit; **(N.B. Accommodations arc not at issue.)**

I. Finding of Fact

The Petitioners contend that, in summary, the District failed to provide an educational program that resulted in meaningful progress in school year 2003-2004.

Material considerations in assessing progress include test results, grades, the IEP and DSTP test results.

Two forms of testing are relevant in evaluating progress.

First, intelligence test results provide guidance or realistic expectations for potential achievement and rates of achievement. For example, it is generally reasonable to expect one year's academic progress in one school year for students of average ability. *Bd of Education of Hendrick Hudson School District v. Rowley*, 458 U.S. 176, 204 (1982).

Second, achievement tests provide an objective measure of progress overtime based on the same or similar instruments.

A. Intelligence Tests

The student's abilities have been measured several times. In October 1997, the WISC-III was administered resulting in a full scale IQ of 84. In September 1998, the student was evaluated at the A. I. duPont Hospital for Children. A psychological evaluation found that his ability level was in the "mildly deficient borderline" range (Wechsler Intelligence Scale for Children-III (WISC-III) FSIQ= 70).

The evaluators concluded that there existed several areas of mild cognitive inefficiency that would negatively impact his rate of learning, as well as additional disorders in the way that the student assimilates new information. Further compounding his learning problems were significant distractibility concerns.

The WISC -III was repeated during the student's psychological evaluation in May 2001. His Full Scale IQ was 70, which falls in the mildly deficient to borderline range of ability.

Dr. Margaret Kay, Petitioners' expert who conducted the Independent Educational Evaluation (IEE), administered his next cognitive functioning test on July 27, 2004. The student was credited with a Full Scale IQ of 68 on the WISC-IV. Dr. Kay explained that she administered the new version of the WISC, which tends to generate lower results than previous tests. She stated that: "... his overall IQ scores are coming in about a borderline range of cognitive functioning, but his Full Scale IQ is lower than it was on the WISC-III, which I think is predictable based on the shifting in the test."

Dr. Kay also administered an alternative intelligence test known as the Kaufman Brief Intelligence Test (K-BIT). The test results show that the student earned an IQ of 89 (at the 23%ile), which falls in the Below Average range.

A third test which measures non-verbal intelligence (TONI-3) was administered to obtain a language free measure of A's cognitive abilities. The student was credited with an IQ or standard score of 72, a percentile rank score of 3 and an age equivalency score of 6 years and 6 months.

Based on the foregoing, Student's intelligence is determined to be in the mildly deficient to borderline range of ability.

B. Achievement

Standardized achievement test results are instructive in objectively assessing progress.

The following recurrent test results provide a sound basis for evaluating the extent, if any, of longitudinal growth.

TEST	DATE	STUDENT'S AGE	GRADE	G.E.SCORE
WRAT-3	5/4/01	9.8	3	Reading-2 Spelling-1 Arithmetic-3
WIAT	5/4/01	9.8	3	Reading-1.6 Spelling-2.3 MathComposit e-2.6
STAR	9/12/02	11	5	Reading-1.1
STAR	10/3/03	12.1	6.10	Reading-2.2
STAR	5/14/04	12.9	6.81	Reading4.0
ESY -Assessments	2003	11.10	ESY-5	Reading-3
ESY -Assessments	2004	12.11	ESY-6	Reading-4.0
QRI	5/04	12.9	End of 6 th grade	Reading-3 rd grade instructional-4 th grade frustrational level
WIAT-II	7/27/04	12.10	summer between 6 th & 7 th grades	Word Reading-2.7 Reading Comp-2.2 Pseudo word decoding-1.6 Range-extremely low Numerical operations-1.8 Math Reasoning-3.2 Range-extremely low Spelling-2.8 Written Expression- 1.5 Range-extremely low

The STAR test results show that the student demonstrated progress in reading. The test measured progress made from the beginning of the sixth grade to the end of the same grade. In addition, progress was demonstrated in the multiple assessments given by the ESY teacher, Ms. Green.

The District's own witnesses buttressed that the student had difficulty achieving yet made meaningful progress.

Ms. Orbin, the science teacher, testified that she supplied extra help to the student and stated that he needed promptings to stay on task (except for labs which apparently he enjoyed very much). The student also had an organizational system in use.

Ms. Robinette, the math teacher, administered a math pre- and post-test during the student's sixth grade. Testimony shows that his scores improved after he was provided an aide for Math. The student needed a lot of support in Math, but he was willing to give answers. Ms. Robinette testified that she saw improvement in Math.

Mrs. Weir, the language arts teacher, testified that she taught the student in small groups using a four block system that included daily phonics work. She described at great length how the language arts program was conducted in her classroom. At times, her classroom contained only ten students.

Mrs. Weir described how the student often volunteered to read aloud in his classroom, and that he could be a leader. She described the writing program and the effective use of visualization to assist in the writing process. She described the student as a creative writer who needs help in details. Software to help in the writing process was utilized to some degree by the student. She described how spelling was incorporated into the program. She administered the Qualified Reading Inventory (QRI) test at the end of the sixth grade. She opined that the student did make progress based on testing and her observations.

Ms. Weir also taught the student in Social Studies. The IEP minutes of May 18, 2004 reflect that the student sat in the front of the class, stayed on track, and completed his work.

C. GRADES

Grade 6

6/14/04

FINAL GRADES

Math = c

Language Arts = B-

Reading/title = C

Science = C+

Social Studies = C-

Comments on the report card range from "a pleasure to have in class," "works to potential," "cooperates with teachers," to "missing assignments" and "needs to turn work in on time." The student was promoted to the 7th grade.

. The validity of the above grades in assessing objective progress may be undermined by several factors. First, no information was given on whether grades are based on a bell curve or what an average grade generally is. Second, grades are not based on a grade level standard. Specifically, if a student is working on a third or fourth grade reading level, his grade reflects third or fourth grade achievement. Third, some subjects, (e.g., Science and Social Studies) are primarily based on effort and participation rather than objective performance.

D. IEP Objectives

Achievement of IEP objectives can prove informative. The student's sixth grade IEP identified reading, writing, and math as areas of concern. In the area of reading, the IEP contained goals and measurable benchmarks. Benchmarks to improve the student's reading level were included. (At 246)

A reading goal stated that "Given a paragraph to read on the 3rd or 4th grade level, (the student) will read the paragraph with 80% accuracy on $\frac{3}{4}$ trials."

The Present Level of Performance indicated that the student's reading comprehension was measured at 70 % at level 3 and 40% at level 4. His initial word recognition was at 88% at level 3 and word recognition at 96% at level 4.

One of the ways to indicate if the student made progress is to compare what the reading levels are in the next year's IEP (2004-2005). In the proposed IEP, the student's reading comprehension was listed as 75% at 3rd level and 63% at the 4th grade level. Word recognition skills were listed at 75% at the 3rd level and 63% at the 4th grade level.

Testimony presented by the District indicated that the teachers were familiar with the IEP and utilized the goals in teaching the student.

E. DSTP Testing

It could argue that the DSTP test results can measure growth in achievement. This is what the District did. The District produced Dr. McAllister, Principal of the Meredith Middle School, as an expert on how DSTP testing can measure growth in a student's academic performance. He opined that looking at the student's scores in totality, the student made consistent growth. The Petitioners did not question the validity of measuring growth via the DSTP, but chose instead to question Dr. McAllister at length about accommodations on the test itself.

F. Related Services

Petitioners claim that related services were denied to the student during the sixth grade. It appears that the Petitioners used the IEE to second-guess what the District did or failed to do as to related services.

The District did provide a Speech and Language Evaluation. The Speech and Language Evaluator concluded that the student did not qualify for speech and language services. This was not questioned by the Petitioners until after the IEE.

The District also performed a Behavioral Analysis of the student after he experienced some difficulties in school and developed a Behavioral Plan. The District utilized Chet Hadley, school psychologist, for both one-on-one counseling and group sessions.

Dr. Kay opined that failure to get a proper academic foundation prior to his arrival in this District rather than his educational placement may have caused the student's adjustment disorder.

The District conducted an Assistive Technology evaluation and suggestions were made.

II. Conclusions of Law

Within the Third Circuit, the District is not required to maximize each student's potential. The District must provide a level of benefit that is "meaningful." and the IEP must provide "significant learning." Trivial educational advancement is insufficient to meet this standard.

In determining the quantum of educational benefit necessary to satisfy IDEA, the Courts explicitly rejected a bright-line rule. Noting that children of different abilities are capable of greatly different achievements, the Court instead adopted an approach that requires a court to consider the potential of the particular disabled student before it.

In this case, the District bears the burden of proof and persuasion that it offered a sixth grade program providing meaningful educational benefit. Title 14 *Del. C. Sec.* 3140.

The District tried sufficient strategies during the first year the student was in the middle school. When the student needed extra help, he was provided with an aide.

Testimony was provided at great length as to how the student was taught, how his programs were modified to meet his needs, and how his needs were addressed. The record indicates that the IEP team met at least 20 times to address parental concerns and often made changes to help the student. Testimony regarding academic growth as measured by the DSTP went un rebutted. Related services were provided, especially in regard to social skills and behavioral problems.

Given the student's intellectual potential, the test results, credible testimony from the student's teachers, it is the decision of this panel that the student made progress in sixth grade.

There was no denial of FAPE in school year 2003-2004.

Issue 2. Whether the proposed IEP for school year 2004-2005 is reasonably calculated to provide the student with meaningful educational benefit and whether the proposed placement was appropriate?

I. Finding of Facts

The team met after the Independent Evaluation by Dr. Margaret Kay was provided to them. In fact, the team met several times, and it is fair to conclude that everything Dr. Kay recommended was incorporated into the proposed IEP. The District offered to arrange an Assistive Technology Evaluation and to consult with the Speech and Language pathologist.

The difficulty lies not within the body of the IEP, but rather where the IEP is to be implemented.

The District argues that the proposed placement would be in small group resource room classes for Language Arts and Math, while being in an inclusion class for Science and Social Studies.

Dr. McAllister, Principal of the' Meredith Middle School, the proposed placement for seventh grade, testified that the school has a continuum of placements which range from an Intensive Learning Center (a restricted environment) to an inclusive class room (a less restrictive environment).

At the August 27 2004 IEP meeting, the team asked the Petitioners to consider the Intensive Learning Center (ILC). The Petitioners adamantly declined to place the student in the ILC because of the nature of the students there and the level of instruction given. The school team decided that the student should receive services in a separate special education class setting for Language Arts and Math and in a regular inclusion setting for Science and Social Studies.

Petitioners did not agree and did not sign the IEP. Petitioners requested that the District place the student in the Lindmoor Bell program, a non-public tutorial speech and language program, for 12 weeks to address the remediation needs identified by Dr. Kay. This program only deals with language arts, specifically but not limited to reading, decoding, and fluency. The District declined.

The testimony in the record is lengthy when discussion of the student's placement for seventh grade is concerned. Testimony by the District is often contradictory. There appears to be an agreement that the student is in need of small classes but not in the ILC. At the end of the discussion, the District offered a placement, i.e., in the inclusion setting for Science and Social Studies, which it previously did not recommend and, in fact, thought may be harmful to the student. Dr. Kay also recommended that the student not be placed in an inclusion setting.

Yet, testimony showed that there was no resource room for the student to receive instruction in Science and Social Studies. Notwithstanding the heroic job that all

members of the team did to provide a well-drafted IEP, there simply was no place to implement it in the District.

The ILC was inappropriate, inclusion was of no real help in the two classes (i.e., Social Studies and Science), and there was no resource room. for those subjects. The placement was a well-discussed item.

It is understandable how the parents would feel frustration on behalf of their son and look elsewhere for a school setting to implement the IEP.

Another meeting was scheduled for September 17, 2004. This meeting was not attended by the Petitioners because they had removed the student from the District.

II Conclusions of Law

This panel does not have to determine if the private school placement, The Vanguard School, is an appropriate placement. The parties agree that the school is an appropriate placement.

AN IEP CAN BE APPROPRIATE BUT A PLACEMENT INAPPROPRIATE.
DENIAL OF FAPE CAN BE A RESULT OF A FAULTY IEP AND/OR PLACEMENT.
HERE THE DENIAL OF FAPE WAS A RESULT OF THE PROPOSED
PLACEMENT.

Accordingly, the panel concluded that the student was denied FAPE as it relates to the 2004-2005 proposed placement.

CONCLUSIONS

Based on the above analysis, the District:

- 1) provided FAPE during the student's sixth grade- school year 2003-2004;
- 2) developed an appropriate IEP for school year 2004-2005, but failed to propose an appropriate placement, accordingly, there *was* a denial of FAPE for this school year.

RELIEF

Petitioners requested compensatory education in the form of a one year extension for service eligibility, tuition reimbursement at the Vanguard School and tuition reimbursement at the Lindamood Bell program, and any relief the panel deems appropriate as remedies for IDEA violations.

I. Compensatory Education

Hearing panels are authorized to confer compensatory education. The Third Circuit authorizes compensatory education based on the following standard:

[A] school district that knows or should know that a child had an inappropriate

IEP or is not receiving more *that (than)* a *de minimus* educational benefit must... correct the situation. We bold that, if it fails to do so, a disabled child is entitled to compensatory education for a period equal to the period of deprivation, but excluding the time reasonably required for the school district to rectify the problem. *M.C. on behalf of J.C. v. Central Regional School*, 81 F3d 4389,397, (3d Cir.), cert. denied, 519 u.s. 866 (1996).

In this case, during the student's sixth grade, the IEP was given much attention. Modification and changes were the norm. The student was provided with a one-on-one Math aide when it became apparent he needed more help. The student had borderline intelligence, yet he was able to demonstrate educational benefit.

The District made concerted efforts to develop an appropriate special education program for him.

Accordingly, it is the decision of the panel, that the student is not entitled to compensatory education in the form of an extension of one year of eligibility for services.

II. Tuition Reimbursement

Tuition reimbursement is an available remedy if a District fails to offer FAPE and parents place their child in an appropriate private school. *Supra. At 395.*

The Supreme Court stresses that tuition reimbursement is an equitable remedy that permits decision-makers to consider all relevant factors. *School Committee of Burlington v. Department of Education*, 471 U.S. 359, 369, (1985)

This panel does not need to consider the appropriateness of the private school as the parties agreed that the school was an appropriate placement.

After writing an IEP which was based on Dr. Kay's report, the District wrestled with placement options. The testimony of the District's witnesses indicated that there was still concern about the student's ability to progress meaningfully in the proposed placement.

Accordingly, this panel has agreed that, under these circumstances, wherein the District failed to provide an appropriate placement for school year 2004-2005, thereby denying FAPE, the parents are entitled to reimbursement of tuition for the Vanguard School until such time as the District provides an appropriate placement.

The Petitioner testified that the student attended the Lindamood Bell program to try to remediate the student's reading and phonics after deficiencies were identified by Dr. Kay.

This panel has concluded that tuition reimbursement of the Lindamood Bell Program is not appropriate for the following reasons:

1. The District incorporated the recommendations identified by Dr. Kay in July 2004 into the proposed IEP;

2. The Lindamood Bell program deals with one specific area of need only and can't be considered a substitute for a full school program.

APPEAL

The decision of the Panel is final.

Any party aggrieved by the decision of the hearing panel may file a civil action in the Family Court or Federal District Court. Such proceeding shall be initiated by the filing of a complaint within 90 days of the date of the decision.

[Title 14 *Del.C.* Sec.3142 (a)]

Patricia M. O'Neill

Dr. Corinne Vinapol

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Mellen

2. The Lindamood Bell program deals with one specific area of need only and can't be considered a substitute for a full school program.

APPEAL

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[Title *14Del.C.* Sec.3142 (a)]

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