

**THREE MEMBER DUE PROCESS HEARING PANEL
EMPOWERED PURSUANT TO 162.961 R.S.MO.**

HEARING DECISION

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Hearing Dates:

December 11 and 12, 2006

Time Line:

September 27, 2006 Complaint received

November 9, 2006 Time for decision
extended to December 31, 2006

Date of Report:

December 29, 2006

Hearing Officers:

Patrick O. Boyle, Chairman
Karen Karns, Panel Member and
Marilyn McClure, Panel Member

**THREE MEMBER DUE PROCESS HEARING PANEL
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HEARING DECISION

Issue

Student is presently nine years of age and has been identified as eligible to receive special education and related services. Parent's complaint raises the issue of whether the student has been provided a free appropriate public education (FAPE) in the least restrictive environment with meaningful participation by student's parent for the two years preceding the filing of the complaint herein on September 27, 2006.

Time Line

Parent's complaint was received by the Missouri Department of Elementary and Secondary Education (DESE) on September 27, 2006. Time for decision was extended to December 31, 2006 by Order dated November 9, 2006 based upon the joint motion of the parties. Decision is hereby rendered within the time as extended.

Findings of Fact

1. Student is nine years of age and was entitled to special education and related services at all times relevant to the complaint herein covering the two year term from September 27, 2004 to September 27, 2006.

2. Student was enrolled in a French Magnet School from September 2, 2004 to December 6, 2004. (Petitioner's Exhibit Page 1)

3. Student was evaluated for special education eligibility on May 27, 2003. (Petitioner's Exhibit Pages 379-439)

4. Student received special education under an individualized education program (IEP) dated May 5, 2004. (Petitioner's Exhibit Pages 492 to 511)

5. Student's IEP specified placement in a regular classroom with 60 minutes per week allocated to special therapy for an identified speech disorder.

6. Student did not learn French and had problems learning to read. His French teacher for kindergarten did not expect him to enroll in the French Magnet School for first grade.

7. Student enrolled three weeks late in October of 2004 for first grade in the French Magnet School.

8. Student's French teacher and principal recommended to student's mother that the student be transferred to an English speaking school in November of 2004.

9. Student was enrolled in an English speaking first grade at an African theme school from December 8, 2004 to May 17, 2005. (Petitioner's Exhibit Pages 1 and 2)

10. Student was cited for defiance of authority and disruptive behavior in late April and early May of 2005. (Petitioner's Exhibit Pages 660-662)

11. Student's mother took exception to the citation for code of conduct violations of late April and early May.

12. Student was transferred to another English speaking school from May 17, 2005 to June 6, 2005 to complete the first grade final quarter.

13. Student enrolled in a different English speaking school for second grade from August 29, 2005 to June 6, 2006. (Petitioner's Exhibit Pages 1 and 2)

14. Student's IEP was reviewed and revised on May 5, 2005. (Petitioner's Exhibit Pages 512 to 533)

15. Student's placement was in the regular class room with 225 minutes per month outside of the regular classroom. (Petitioner's Exhibit Pages 520 and 522)

16. Student was cited for fighting on 09/06/05 and given a three day suspension. (Petitioner's Exhibit Pages 41 and 42)

17. Student's mother took him to a Transition Center during the terms of his suspensions.

18. A Functional Behavioral Assessment (FBA) of the student was done on October 3, 2005. (Petitioner's Exhibit Pages 188 and 189)

19. A Behavioral Intervention Plan (BIP) was developed for the student on October 3, 2005. (Petitioner's Exhibit Pages 190 through 194)

20. Student was cited for punching a girl on October 17, 2005 and given a five day suspension. (Petitioner's Exhibit Pages 56 and 57)

21. Student's mother entered the school and, a confrontation occurred within the building as a result of the Code of Conduct Citation for the October 17 assault.

22. Student's mother was restrained from entering the building thereafter and, the student was transferred to a different classroom teacher in the same school.

23. Student's three year reevaluation was begun on January 23, 2006. (Petitioner's Exhibit Pages 554 to 581)

24. A revised IEP was developed for the student on March 29, 2006. (Petitioner's Exhibit Pages 582-600)

25. A FBA was begun for the student on April 18, 2006. (Petitioner's Exhibit Pages 195 to 218)

26. A revised BIP was developed for the student on May 17, 2006. (Petitioner's Exhibit Pages 219-222)

Decision and Rationale

The party requesting a due process hearing has the burden of proving the claims made in the request. Evidence submitted on behalf of the student's mother does not warrant the conclusion that the claims made in the complaint are valid.

No special education teachers were called to testify concerning the student's IEP, the implementation of the IEP or the progress which student made on the IEP.

Student's regular class room teachers did testify. They stated their opinion that the student's low academic achievement is the result of student's enrollment in a French immersion school for kindergarten and one-half of first grade. They further testified that student is making academic progress in their class room.

Abner Stern, a professional psychologist, was called by student's mother to testify. The Local Education Agency (LEA) objected to the testimony of Abner Stern on the basis that no evaluation, reports, notes or documentation completed by him had been furnished to the LEA or listed in Petitioner's Exhibits to be introduced.

The LEA further objected to Abner Stern's testimony as being irrelevant since he did not attend IEP meetings or any other meetings with school officials.

The objections of the LEA are well taken and, the testimony of Abner Stern is excluded from the determination of this hearing.

Abner Stern was permitted to testify on the record as a matter of proof.

Abner Stern gave a prognosis that the student will be diagnosed with Oppositional Defiant Disorder (ODD) unless sophisticated interventions are developed by a professional psychologist as part of the student's BIP. He further stated that the student's educational program should be secondary to the mental health of the student.

Abner Stern also gave the opinion that the student may be dyslexic.

Abner Stern's opinions were based upon a review of the student's records and, a conference a week before the hearing.

The opinions of Abner Stern can not be used to evaluate any of the student's IEPs but, they are reason to have the student reevaluated. LEA and the student's mother should promptly seek a reevaluation of the student involving the observations and opinions of a professional psychologist. An IEP team may decide that a professionally developed BIP is required both for the student's mental health and educational purposes.

Student's mother also claims that she could not meaningfully participate in student's education without all of the student's educational records. Evidence at hearing did not support the mother's claim that she had been denied access to any relevant educational record of the student.

Student has been provided FAPE in the least restrictive environment by the LEA and, student's mother has been provided the opportunity for meaningful participation in the student's education.

Appeal Procedure

Either party has the right to appeal this decision within 45 days to a State Court of competent jurisdiction pursuant to Chapter 536 of the Revised Statutes of Missouri, or to a Federal Court.

Panel Members Supporting Decision

Patrick O. Boyle
Karen Karns

Panel Members Opposing Decision

Marilyn McClure

**THREE MEMBER DUE PROCESS HEARING PANEL
EMPOWERED PURSUANT TO 162.961 R.S.MO.
HEARING DECISION
DISSENTING OPINION**

Marilyn McClure, Panel Member

ISSUE

The Petitioner, in her amendment to the complaint, alleges up to 72 violations of the IDEA.

FACTS

This panel member considers these following facts as well as the aforementioned facts of the majority opinion when considering the complaint:

1. This male student who has a low-average IQ and speech deficits (per 5-04 IEP document) attended the early childhood program in the same district. The student attended a French immersion school for about half of kindergarten and four-five months of first grade. His teacher spoke only French to the student(s). The teacher testified “I think he had IEP . . .” and she testified as to the number of IEP meetings (that she had attended in her experience) maybe been to one meeting . . .not for . . .”.

2. She testified he “didn’t comprehend French at all; problems increasing” and “problems almost every day; ran out of room”, “23 kids and one runs out is strange to me . . .” and the parent was called frequently to come to the school to deal with the student. She testified that she mentioned to parents at a Parent-Teacher conference in November 2004 that French did not work for him and that a suggested list of schools in area for the student to attend was presented to the parent. She testified that his grades were based on an adjusted curriculum and that she acquired preschool materials for him.

3. The May 04 IEP meeting appears to have been the only IEP meeting held during his Kindergarten year, near the end of the Kindergarten year of which this teacher did not attend.

4. The May 05 IEP Present Level of Performance section indicates “behavior is a concern” and is being monitored, yet on page four of the document, item three was checked “no” for this student not exhibiting behaviors that impedes the learning of himself or others.

5. Petitioners attorney indicated transition service records were not provided to her prior to this hearing. Kindergarten teacher testified “school should have progress reports”.

6. For first grade he attended Ladd school then transferred to Knotts school.

7. The student transferred to Pinkerton school for second grade where he had one main teacher for a few months then was transferred to another classroom where he would have a different teacher. Both teachers he had there testified he had a “speech IEP”.

8. The first Pinkerton teacher testified she “didn’t know he was a non-reader . . .”. She testified he was a kindergarten level when he got to this class and no information of behavior problems; mother told her ADHD and no information of other probs was provided to her. This teacher talked to counselor, parent, white, nurse, coach and a “care team” about his behaviors. No IEP meeting was held during the time she was his teacher.

9. Late in October 2005, the student was transferred to the other second grade teacher in the building. She testified that she warned boy that man would be called if he

wouldn't stop inappropriate behavior. This teacher, Ms. Collins, testified that early in year called mom was called once every two or three weeks, later more for behavior's . . . once every two weeks. She also said on days when he was not on med's he acted out, and, she was aware of problems in support classes . . . and he had bus problems including he wouldn't listen, used profanity; he wouldn't stop talking on the day he was sent to office . . she knew before he came his behavior's were disrupting to others. She also said never looked at the boy's special ed file and she relies on speech teacher to give to her boy's goal. An annual IEP meeting was held near the end of the school year but this teacher did not attend the IEP meeting.

10. This student was sent several days to classrooms of older students for the full day. He also was sent to a center (out of the building) where student's who have been suspended attend. The student was suspended from the bus several times.

11. First full evaluation conducted 3-06. Ms. Collins testified she got a copy of new IEP in April 06 for the last 2 months of the school year. Ms. Walters would pull out student for LD service in reading.

12. The Exceptional Education Regional Coordinator stated nobody asked her for progress reports. Mrs. Collins, the second Second Grade teacher, said she throws away grade books after the year and that she is not aware of records retention; School District had not given her info about it.

DECISION AND RATIONALE

Petitioner's case is supported by Petitioner's witnesses and exhibits.

Classroom teachers testified that they believe the student's academic problems are the result of students 1 ½ years in a French immersion class. Witnesses are indifferent or unaware to the need to follow IDEA other than annual IEP meetings of which most witnesses who were teachers of this student did not attend. Teachers struggled to provide programming to the student but lacked the supports they needed as well as the supports the student needed that could have been arranged for by a knowledgeable and informed IEP team.

The school district was indifferent to the needs this student when the French Immersion School was considered and he placed there; his existing disabilities were not taken into consideration and therefore the IEP was not reasonably calculated. This error is extremely significant and seriously affected a foundational and critical early learning years. Although the school building was convenient for the parent, the exposure to French should not have overridden the needs of the student who has special needs. His native language and language used at home is English.

In second grade the first teacher sought assistance from others as well as a "care team" yet these personnel were indifferent to the needs of the teacher as well as the student; the process allowed for in IDEA was not initiated. The boy should have been reevaluated much earlier that he was. Also IDEA, requires a student to be evaluated for suspected disabilities; this boy was considered a non-reader yet he only received some speech services.

This student did not receive related services of which an IEP team can provide; psychological services should have been considered by the IEP team as well as parent training for the parent. This student needed psychological interventions and the parent needed training about her potential role allow for in IDEA.

This panel member heard testimony describing the behaviors of the parent of which much was irrelevant. The parent had no understanding of the significance of the IEP process and her potential role in it. The parent did not receive adequate guidance about IDEA and as a result became frustrated. A parent does not have a duty to participate in the IEP process, yet this parent frequently received telephone calls from the school about her son's behavior. The lack of the parent to have knowledge or an understanding of the IDEA doesn't negate the responsibility of the school district to follow IDEA.

The teaching staff also needs supports which should have been provided by the IEP team, these teachers and school personnel should have conducted IEP meetings early in each school year and should have invited experts to these meetings.

The school staff needs training in record keeping. Teachers testified they threw away grade books and other records. This panel was unable to access if progress took place in his speech sessions since some progress reports/therapist notes were not made available.

I confirm with my fellow panel members that this boy needs to be reevaluated; I would emphasize it would need to be a proper reevaluation that includes an independent professional psychologist who will design an appropriate Behavior Intervention Plan with

the team. This Behavior Intervention Plan needs to allow for training of the staff(s) in the buildings who will be working with the child.

Petitioner has made a case.

Mariyn McClure
December 27, 2006