

BEFORE THE THREE MEMBER DUE PROCESS PANEL
EMPOWERED BY THE MISSOURI STATE BOARD OF EDUCATION
PURSUANT TO RSMo. §162.961

, by and through her)
Parent,)
) February 4, 2009
Petitioners,)
vs.)
)
MAPAVILLE STATE SCHOOL/STATE)
SCHOOLS FOR SEVERELY)
HANDICAPPED,)
)
Respondent.)

DECISION

This is the final decision of the hearing panel in an impartial due process hearing pursuant to the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. §1415(f), and Missouri law, §162.961.3-.5 RSMo.

I. THE ISSUES

1. The following fundamental issue was presented to the Hearing Panel:

Issue Number 1. Did Respondent, as a result of failing to adequately implement IEPs, deny Student a free appropriate public education?

II. FINDINGS OF FACT

The Hearing Panel makes the following Findings of Fact:

A. The Parties, Counsel and Hearing Panel Members

1. During all times material to this due process proceeding, the Student resided with her Mother (“Mother”), within boundaries making her eligible to attend the Mapaville State School for the Severely Handicapped (“Mapaville or Respondent”), where she has been a Student since the fall of 2001.

2. Mapaville is a public school organized pursuant to Missouri statutes and is located in Jefferson County, Missouri.

3. The Student and her Mother were represented at the hearing by Andrew W. Kuhlmann, Esq., of the Law Offices of Jonathan P. Beck, LLC, 3206 Shenandoah Avenue, St. Louis, Missouri 63104.

4. Mapaville was represented at the hearing by Christopher J. Quinn, Esq., Assistant Attorney General for the State of Missouri, Post Office Box 861, St. Louis, Missouri 63188.

5. The Hearing Panel for the due process proceeding was: Richard H. Ulrich, Hearing Panel Chair; Ms. Pamela Walls, Panel Member; and Mr. George Wilson, Panel Member.

6. Any findings of fact contained herein that could be deemed conclusions of law should be treated as such, and any conclusions of law that could be deemed findings of fact should likewise be treated as such.

B. Procedural Background and Timeline Information

7. Mother requested due process (“Complaint”) by filing the Complaint with the Missouri Department of Elementary and Secondary Education (“DESE”) on March 20, 2008 (Panel Ex. 1.)

8. On or about March 20, 2008, DESE notified the Panel Chair of his appointment to serve on the Hearing Panel. On or about March 27, 2008, DESE notified Ms. Walls and Mr. Wilson of their appointments to serve on the Hearing Panel.

9. On or about March 28, 2008, Respondent filed an Answer to the Complaint and also filed, in letter form, a challenge to the sufficiency of the Complaint. (Panel Ex. 2)

10. On or about April 2, 2008, the Hearing Panel Chair issued an Order sustaining Respondent’s Challenge to the Complaint and granted Petitioners an additional fifteen (15) days

to file an Amended Complaint addressing the shortcomings set forth in the Panel's Order. (Panel Ex. 3)

11. On or about April 2, 2008, the resolution conference was held and the parties were unsuccessful in reaching an amicable resolution of the issues. The Hearing Panel Chair was advised of this by letter dated August 28, 2009. (Panel Ex. 4)

12. On or about April 4, 2008, Respondent filed a Motion to Dismiss and in Limine. (Panel Ex. 5)

13. On or about April 7, 2008, Petitioners filed a First Amended Due Process Complaint (Panel Ex. 6) and a Response in Opposition to Respondent's Motion to Dismiss and in Limine. (Panel Ex. 7)

14. On or about April 14, 2008, Respondent filed a Notice of Insufficiency and Further Response (Panel Ex. 8), and a Motion to Dismiss First Amended Complaint and in Limine, and a challenge to the sufficiency of Petitioners' First Amended Complaint in letter form. (Panel Ex. 9)

15. On or about April 17, 2008, the Hearing Panel Chair issue an Order partially sustaining Respondent's challenge to the First Amended Complaint, wherein it was ruled that the issue(s) before the Panel is the adequacy and implementation (or the failure thereof) of the Student's May 18, 2007 IEP. (Panel Ex. 10)

16. On or about May 19, 2008, pursuant to the Order of April 17, 2008, as mandated by the State Plan, a telephonic conference was held with the parties' attorneys and the Hearing Panel Chair participating.

17. On May 22, 2008, an Order was issued by the Hearing Panel Chair setting forth guidelines for the hearing which was scheduled for September 22, 23 and 24, 2008. (Panel Ex. 11)

18. On or about June 16, 2008, Petitioner requested leave to file a Second Amended Complaint, with the request being accompanied by the proposed Second Amended Complaint. (Panel Ex. 12).

19. On or about June 19, 2008, Respondent filed an Objection to Petitioners' request to file a Second Amended Complaint. (Panel Ex. 13)

20. On or about June 19, 2008, Petitioners filed a Response to Respondent's Objection to Petitioners' Motion for Leave to File the Second Amended Complaint. (Panel Ex. 14)

21. On June 30, 2008, the Hearing Panel Chair issued an Order granting Petitioners leave to file their Second Amended Complaint, however, sua sponte, struck certain components of Petitioners' Second Amended Complaint. (Panel Ex. 15)

22. On or about July 11, 2008, Respondent filed a Motion to Dismiss Petitioners' Second Amended Complaint (Panel Ex. 16) and a Notice of Insufficiency and Further Response to Petitioners' Second Amended Complaint. (Panel Ex. 17).

23. On July 18, 2008, the Hearing Panel Chair issued an Order denying Respondent's motions of July 11, 2008, in light of the Panel's Order of June 30, 2008, which struck portions of Petitioners' Second Amended Complaint. (Panel Ex. 18)

24. On July 30, 2008, the Hearing Panel Chair issued an Order setting a telephonic conference with the attorneys on August 21, 2008. (Panel Ex. 19)

25. On August 25, 2008, the Hearing Panel Chair issued an Order memorializing the telephonic conference of August 22, 2008. (The telephone conference set for August 21, 2008 was continued to August 22, 2008 due to Respondent's attorney being unavailable on August 21, 2008.) Said Order, among other things, granted Respondent's request for a continuance from the September 22, 23 and 24, 2008 hearing dates. By agreement, the hearing was rescheduled for November 17, 18, 19 and 20, 2008 with the decision to be rendered on or before December 20, 2008. (Panel Ex. 20)

26. On November 18 and 19, 2008, testimony was presented at the hearing. At the conclusion of the hearing, Respondent orally requested the Panel to dismiss Petitioners' case on the basis that they did not make a submissible case. The request was denied. Both parties requested leave to file post-hearing briefs. The request was granted and upon assurance by the court reporter that the transcript would be completed no later than December 1, 2008, the parties, upon mutual request, were granted until January 5, 2009 to file simultaneous post-hearing briefs. The decision shall be entered on or before February 5, 2009. (Panel Exs. 21 and 22)

C. Background Facts

27. Student, 16 years of age, has a diagnosis of severe mental retardation, autism, and epilepsy, with significant developmental delays being below a one year development level. Student needs assistance in feeding, toileting and walking. She is non-verbal.

28. Prior to attending Mapaville, Student attended school in New Jersey, where she had a one-on-one aide. While attending school in New Jersey Student's mother was very pleased with the education afforded Student, and Mother primarily attributed the successful education experience to the one-on-one assistance.

29. While attending Mapaville, during the relevant timeframe, March 21, 2006 to March 20, 2008, Student was in a class with five to six other students with educational services being provided by a teacher and two aides. Since Mapaville is a school for the severely disabled, Student, at no time, was schooled with non-disabled peers.

30. From March 21, 2006 to March 20, 2008 (“relevant timeframe”), there were three operative IEPs: 1) September 12, 2005; 2) May 19, 2006; and 3) May 18, 2007.

31. Petitioners make no claims that any of the IEPs are procedurally defective.

32. Petitioners’ complaint centers on the implementation of the IEPs. In so doing, Petitioners maintain that the IEPs were not appropriately implemented and, by virtue thereof, Student was not afforded a free appropriate public education (“FAPE”).

33. The primary reason supporting Petitioners’ contention that the IEPs were not appropriately implemented is, according to Petitioners, Mapaville’s failure to provide Student with a one-on-one aide. Petitioners maintain that the language contained in the IEPs mandates that Mapaville provide Student with an aide specifically designated for Student.

34. The IEP language which forms the basis of Petitioners’ belief that a one-on-one aide is required is:

- a) September 12, 2005: There is no language referring to a one-on-one aide;
- b) May 19, 2006: The Present Level of Academic Achievement and

Functional Performance Section input reads:

How the disability of the student affects involvement and progress in the general education curriculum: Student requires a structured learning environment to decrease distractions. She requires a one-on-one staff to student ratio to adapt her instruction and prompt her to stay on task which will cause non-disabled peers to disengage from learning activities.

- c) May 18, 2007: Under the Present Level of Academic Achievement and

Functional Performance Section input reads:

How the disability of the student affects involvement and progress in the general education curriculum: Student would require a structured learning environment to decrease distractions. She would require a 1:1 student to staff ratio to adapt instruction and prompt her to remain on task, which could cause non-disabled peers to disengage from learning activities.

35. Petitioners also maintain that there was possible abuse, neglect and harassment on the part of the staff of Mapaville which also contributed to the failure to implement the IEPs in question. The Panel finds that there was no abuse.

36. In regard to neglect, there was testimony about two specific episodes:

- a) On or about May 24, 2006, Student, with an aide alongside, fell backwards, out of a chair, hitting her head on a metal cabinet. Mother was called and Student was taken to the hospital for sutures; and
- b) On one occasion, Student, while using the toilet, slipped into the commode. Thereafter, adaptive equipment was used and there were no similar incidents.

In addition to testimony about these two episodes, exhibits reflect that Student, on or about November 19, 2007, fell out of her walker while perhaps unattended, and, on or about March 20, 2008, Student's wrist was squeezed and she was scratched by another student.

While the episodes may suggest closer attention was warranted, there is no indication that they meaningfully interfered with Student's education or harmed her educationally.

37. In regard to harassment, several episodes were cited:

- a) Staff at Mapaville made two hotline calls concerning Student. While Mother testified that she did not have a problem with the first call which concerned loss of hair and bruising on the Student caused by a change of medication, she felt the second hotline call was unreasonable, unfounded and unnecessary, as the reason given for making the hotline call was the

school needed a doctor's note, and if that was the problem, she would have procured one.

Mother testified that by the staff making a hotline call, it did not harm Student educationally.

Other references to the staff's conduct toward Student and Mother indicate problems of communication, such as Mother's belief that on some occasions staff members over-reacted and on other occasions they under-reacted.

None of the above suggestions of harassment equated to educational harm to Student.

38. Mother was the lone witness for Petitioners.

39. The witnesses for Mapaville were Dolores Kestermont and Alecia Glore. Ms. Kestermont served as an aide for Student for the 2006-2006 and the 2006-2007 school years. Ms. Glore served as an aide for Student for the 2006-2007 school year.

40. In regard to educational progress, Mother testified that she believed that Student made progress on some goals, but also testified that she believed that Student did not make educational progress. She also testified that Student did not regress.

41. In regard to educational progress, Ms. Kestermont and Ms. Glore testified that Student experienced educational progress, often referring to progress charts for the 2005-2006 and 2006-2007 school years to support their conclusions. The Panel has concerns about the charts as they are based upon Student's best efforts or the data was taken on Student's "good days." The charts also contained some counter-indications and when pressed to explain them, Ms. Kestermont and Ms. Glore testified that the notations depicting mastery of skills were by Student's teacher, based upon his judgment. Mapaville also presented additional progress charts and reports of Student's progress, some of which related to the May 19, 2006 IEP, however, no one testified about them. No teachers testified.

42. The case was submitted to the Panel solely on the issue of whether Student's IEPs were appropriately implemented.

III. – CONCLUSIONS - DECISION

A. Governing Law.

This case arises under, and is governed by, the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, as amended (“IDEA”); the IDEA’s implementing regulations, 34 C.F.R. Part 300; Missouri’s special education statutes, §§162.670-162.999, RSMo.; and the Missouri state regulations implementing its special education statutes, 5 C.S.R. §70-742.140 (“State Plan”). The State Plan constitutes regulations of the State of Missouri, which further defines the rights of students with disabilities and their Parents and regulates the responsibilities of educational agencies. The State Plan was in effect at all material times during this proceeding.

The IDEA, its regulations and the State Plan set forth the rights of students with disabilities and their Parents, and regulate the responsibilities of educational agencies, such as Mapaville in providing special education and related services to students with disabilities.

Student is clearly a “child with a disability,” as that term is defined in the IDEA, its regulations, 34 C.F.R. §300.7 and the State Plan, having a diagnosis of severe mental retardation, autism and epilepsy. She needs assistance in feeding, toileting and walking. She is non-verbal and is below a one year developmental level.

The IDEA and Missouri law require that a disabled child be provided with access to a “free appropriate public education.” (“FAPE”) *Board of Education of the Hendrick Hudson Central School District of Westchester County v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 3049, 73 L.Ed.2d 690 (1982), and §162.670 RSMo. The IDEA is designed to enable children with disabilities to have access to a free appropriate public education which is designed to meet their

particular needs. *O'Toole by O'Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692, 698 (10th Cir.1998).

The term “free appropriate public education” is found in the IDEA 20 U.S.C. §1401(8) and is defined by 34 C.F.R. §300.8 as follows:

“...the term ‘free appropriate public education’ means special education and related services that--(a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA, including the requirements of this part; (c) Include preschool, elementary school, or secondary school education in the State involved; and, (d) Are provided in conformity with an IEP that meets the requirements of §300.340--300.350.” A principal component of the definition of FAPE is that the special education and related services provided to the student with a disability, “meet the standards of the SEA” (State Board of Education), and “the requirements of this part”. 34 C.F.R. Part 300.

If Parents believe that the educational program provided for their child fails to meet this standard, they may obtain a state administrative due process hearing. 34 C.F.R. §300.506; *Thompson v. Board of the Special School District No. 1*, 144 F.3d 574, 578 (8th Cir. 1998); *Fort Zumwalt School District v. Clynes*, 119 F.3d 607, 610 (8th Cir. 1997), cert. denied 523 U.S. 1137, 118 S.Ct. 1840. 140 L.Ed2d 1090 (1998).

Herein, Mother is challenging the implementation of Student’s September 12, 2005, May 19, 2006 and May 18, 2007 IEPs.

1. Compliance with the IDEA

In analyzing whether the mandates of the IDEA have been met, we start with *Board of Educ. of Hendrick Hudson Central School Dist. v. Rowley, id.*, wherein the United States Supreme Court pronounced:

[A] court’s inquiry in suits brought under §1415(e)(2) [of IDEA] is twofold. First, has the state complied with the procedures set forth in the Act. And second, is the individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits. *Id.*, pp. 206-207.

a. Procedural Compliance with the IDEA

Petitioners did not present any evidence of procedural violations. To the contrary, they stipulated that there was no argument with procedure.

b. Substantive Compliance with the IDEA

The substantive heart of the IDEA is its requirement that a disabled child be provided with access to a “free appropriate public education.” (“FAPE”). *Rowley*, 102 St. Ct. at 3034. The term “free appropriate public education” is defined above.

IDEA is designed to enable children with disabilities to have access to a free appropriate public education that is designed to meet their particular needs. *O’Toole v. Olathe Unified Sch. Dist. No. 233*, 144 F.3d 692, 698 (10th Cir. 1998). IDEA requires the District to provide a child with a disability with a “basic floor of opportunity. . . which [is] individually designed to provide educational benefit to the handicapped child.” *Rowley*, 102 S. Ct. 3034, 3047.

In so doing, the IDEA does not require that a school district “either maximize a student’s potential or provide the best possible education at public expense,” *Rowley*, 102 S. Ct. 3034, 3049; *Fort Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 612 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 1840 (1998); *Rowley*, 102 S.Ct. at 3049; *Peterson v. Hastings Public Sch.*, 31 F.3d 705, 707-08 (8th Cir. 1994); *A.W. v. Northwest R-1 Sch. Dist.*, 813 F.2d 158, 163-164 (8th Cir. 1987). Likewise, the IDEA does not require a school district to provide a program that will “achieve outstanding results,” *E.S. v. Indep. Sch. Dist. No. 196*, 135 F.3d 566, 569 (8th Cir. 1998); that will provide “superior results,” *Fort Zumwalt Sch. Dist.*, *supra*, 119 F.3d at 613; or that will provide the placement the parents prefer. *Blackmon v. Springfield R-XII Sch. Dist.*, 198 F. 3d 648, 658 (8th Cir. 1999).

IDEA is satisfied when the educational agency provides individualized education and services sufficient to provide the disabled child with “*some educational benefit.*” *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 (8th Cir. 2003) (emphasis supplied), quoting *Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 658 (8th Cir. 1999). Accord, *Gill v. Columbia 93 School District*, 217 F.3d 1027, 1036 (8th Cir. 2000) (“Because Missouri has not shown that it intended to employ a higher standard than that required by the IDEA, the test here is whether [student’s] individualized program was sufficient to provide him with some educational benefit”).

The Eighth Circuit has noted that analysis of the failure to implement an IEP is “slightly different in posture” from the more usual alleged substantive claims of violation of the IDEA. *Neosho R-V Sch. Dist. Id. at 1027 n. 3.* “[T]o prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.” *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000), *cert. denied*, 531 U.S. 817, 121 S.Ct. 55, 148 L.Ed.2d 23 (2000), cited with approval in *Neosho R-V Sch. Dist., Id.* The *Bobby R.* court continued, “determination of what are ‘significant’ provisions of an IEP cannot be made from an exclusively *ex ante* perspective. Thus, one factor to consider under an *ex post* analysis would be whether the IEP services that were provided actually conferred an educational benefit.” *Bobby R.*, 200 F.3d at 349, n.2. See also *Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811 (9th Cir. 2007) (“In accordance with the IDEA itself, the Court’s decision in *Rowley*, and the decisions of our sister circuits, we hold that a *material* failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a

school provides to a disabled child and the services required by the child's IEP"); *Catalan v. District of Columbia*, 478 F.Supp.2d 73, 74 (D.D.C. 2007) ("Though the D.C. Circuit has not squarely addressed the question of what standard to apply to failure-to-implement claims under IDEA, the constant approach to this question among federal courts that have addressed it has been to adopt a standard articulated by the Fifth Circuit in *Houston*).

The Panel holds that the only evidence presented regarding a substantive failure to implement that would yield a finding of a violation of IDEA would be to conclude that the IEPs in question compelled a one-on-one aide for Student.

Where a petitioner alleges harassment or abuse, the Eighth Circuit has noted that "[t]wo circuits have ruled that harassment might be so severe and prolonged that it deprives the child of access to educational benefits, and thus it deprives the IDEA." *Stringer v. St. James R-1 School Dist.*, 446 F.3d 799, 803 (8th Cir. 2006) (noting that the petitioners nonetheless failed to state a claim in the district court where there was no showing that the harassment deprived access to the basic educational benefits of a free appropriate public education). The Panel holds that the evidence as it related to harassment, abuse or neglect, to the extent it may have marginally existed, did not harm or impair Student's education.

2. Burden of Proof

The burden of proof in an IDEA due process hearing is placed upon the party seeking relief. *Schaffer v. Weast*, 549 U.S. 49, 62 (2005). The due process complaint in this matter was filed by Mother. Accordingly, the burden of proof on the issues to be determined by the Panel rests with the Parent.

The Supreme Court's reference as to the burden of proof is burden of persuasion, which means that the student and their parents lose at the conclusion of the case if the evidence on both

sides is evenly balanced. *Id.* at 58. The standard of proof in this administrative proceeding, as in most civil cases, is proof by a preponderance of the evidence. *Tate v. Department of Social Services*, 18 S.W. 3d 3, 8 (Mo. App. E.D. 2000).

B. Findings-Conclusions as to whether the applicable IEPs mandated a one-on-one aide for Student.

The applicable language in the IEPs referring to a one-on-one aide is set forth above. While the May 18, 2006 IEP states the Student requires a one-on-one aide, staff to student ratio and the May 19, 2007 IEP states the Student would (emphasis added) require a 1:1 student to staff ratio, both references are within the context of a general education curriculum in order to adapt instruction and prompt Student to remain on task, which would cause non-disabled peers to disengage from learning activities. There are no disabled students at Mapaville. The language in the IEPs referencing a dedicated aide is an apparent attempt to satisfy IDEA regulation 300.320(a)(1)(i) which is of questionable relevance, because the “general curriculum” is not applicable in this case. The Panel believes, and so holds, that the IEPs do not compel a one-on-one aide. This holding is further buttressed by the fact that some of the goals and benchmarks contained in the May 19, 2006 IEP specified that instruction was to occur on a one-on-one basis while others did not. Also, during the applicable timeframe, Mother was aware that Student did not have a dedicated aide but never objected thereto.

C. Findings-Conclusions as to whether Student received an educational benefit.

Mother testified that she did not believe that her daughter made educational progress. She also testified that Student made progress on some goals and benchmarks. Mapaville’s aides testified that they worked on Student’s goals daily and educational progress was made. The Panel is not convinced that Respondent’s charts proved educational progress given the fact they

were based upon Student's best days and/or her best efforts. The person (teacher) making the judgment that certain skills were mastered and the author of the reports of Student's progress did not testify, and no explanation was given for his absence. However the aides did, based upon their day to day contact, support their conclusion that Student received educational benefit under the 2005-2006 and 2006-2007 IEPs. There was no testimony from Respondent that educational benefit was conferred for the 2007-2008 school year although progress reports for that school year seem to indicate some educational progress was made.

Whether convinced or not that the Student received meaningful educational benefit is not defining as it was Petitioners' burden to prove meaningful educational benefits were not provided and they did not do so.

CONCLUSIONS - DECISION

For the reasons stated above, the Panel concludes that Petitioners did not carry their burden of proof in proving that there was a substantial or significant failure to implement IEPs or that Student did not receive educational benefit.

REMEDY-RELIEF

No relief is ordered.

Appeal Procedure

This is the final decision of the Department of Elementary and Secondary Education in this matter. A party has a right to request a review of this decision pursuant to the Missouri Administrative Procedures Act, §§536.010 *et seq.* RSMo. A party also has a right to challenge this decision by filing a civil action in federal or state court pursuant to the IDEA. *See* 20 U.S.C. §1415(i).

Dated: _____

Richard H. Ulrich, Chairperson

Pamela Walls, Hearing Panel Member

George Wilson, Hearing Panel Member

CERTIFICATE OF SERVICE

I do hereby certify a copy of the foregoing was placed in the U.S. Mail, postage prepaid by certified mail, return receipt requested this 4th day of February, 2009, addressed to:

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