

MISSOURI DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION

IN RE:

, by Parent,

Petitioners,

vs.

ACADEMY OF KANSAS CITY CHARTER SCHOOL,

Respondent.

DECISION AND ORDER

PARTIES

Petitioners

-

, student

, parent

By Counsel:

Mr. Herbert V. White, Jr.

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Kansas City, MO 64106

Respondent

Ms. Virginia M. Giokaris

Polsinelli, White, Vardeman and Shalton

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PANEL MEMBERS

Diane Golden, Panel Member
Terry Allee, Panel Member
Robert K. Angstead, Chairman

HEARING REQUEST AND EXTENSION DATES

Hearing Request Received: January 5, 2000
Joint Timeline Extension Request Received: February 11, 2000
Decision and Mailing Deadline: March 14, 2000

**THE STATE BOARD OF EDUCATION
BEFORE THE HEARING PANEL
(Pursuant to Section 162.961 RSMO)**

In the Matter of:

, by and through his parent, ,

Petitioner,

and

Academy of Kansas City Charter School,

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

HEARING INFORMATION

The above-entitled matter came on for hearing before the Due Process Hearing Panel consisting of Robert K. Angstead, Esq., Chairman, and Drs. Diane Golden and Terry Allee, pursuant to RSMo, §162.961 on February 22, 2000, at the Academy of Kansas City Charter School, 2015 East 72nd Street, Kansas City, Missouri. The hearing was closed in accordance with the provisions of Missouri regulations and parental request.

TIME-LINE INFORMATION

Petitioner's Notice of Request for Expedited Due Process hearing was received by the Missouri Department of Elementary and Secondary Education on January 5, 2000 (Ex. H-1, H-2 and H-3). By letter from Petitioner's attorney dated February 11, 2000, the hearing was continued from the original forty-five day time-line and set for hearing on February 22, 2000 (Ex. H-10 H-12 and H-16). At the conclusion of the hearing, the parties stipulated to the fact that they each had until March 6, 2000, to submit proposed findings of fact and conclusions of law to the Panel (Tr.-310, II. 11-24). The parties agreed that the Panel's decision and order be completed and placed in the mail to them no later than March 14, 2000 (Tr.-310, II. 22-24).

ISSUE

Whether the Academy of Kansas City Charter School failed to provide Petitioner with a free appropriate public education (FAPE) pursuant to the Individuals with Disabilities Education Act and the Missouri State Plan for Part B of the Individuals with Disabilities Education Act through Respondent's programmatic noncompliance thereof in failing to evaluate Petitioner's education functioning and subsequent failure to develop an individualized education program to meet Petitioner's educational needs as required by law.

FINDINGS OF FACT

1. (hereinafter "Student" or "Petitioner") was born on (Stipulation 1; Ex. H-21).

2. Ms. (hereinafter "Parent") is Petitioner's mother (Tr.-241, Il. 12-14).

3. Student enrolled at the Academy of Kansas City Charter School (hereinafter "Respondent") in early September, 1999, as an 8th grade student for the 1999-2000 school year (Stipulation 2; Ex. H-21).

4. As a charter school, Respondent is required to comply with RSMo §160.405 (Stipulation 5; Ex. H-21).

5. Student did not have an Individualized Education Plan when he started the 1999-2000 school year (Stipulation 3; Ex. H-21).

6. Based upon the observations of Student's middle school teachers, he had the ability to understand and follow classroom instructions. That ability was not deficient in any way. Jacinta Brown (Tr.-40, Il.16-22); Tim Johnson (Tr.-178, Il. 3-10); Edward Wills (Tr.-205, Il. 14-25); Deborah Green (Tr.-222, Il. 18-25).

7. Based upon the observations of Student's middle school teachers, he had the ability to read and comprehend class materials. That ability was not deficient in any way. Jacinta Brown (Tr.-40, Il. 24-41, 3); Tim Johnson (Tr.-178, Il. 11-15); Deborah Green (Tr.-223, Il. 1-6).

8. Based upon the observations of Student's middle school teachers, he had the ability to write in class. That ability was not deficient in any way. Jacinta Brown (Tr.-41, Il. 4-8); Tim Johnson (Tr.-178, Il.16-20); Edward Wills (Tr.-206, Il. 1-24); Deborah Green (Tr.-223, Il. 7-13).

9. In computer class, Student correctly completed assignments that demonstrated all of these abilities. Jacinta Brown (Tr.-41, Il. 9-13, 20-43:11); (Exhibit R-29 at pp. R-129-131).

10. In math class, Student correctly completed homework assignments, as well as

problems on the chalkboard in class, that demonstrated all of these abilities. (Tr.-178, Il. 21-180:12, 181 Il. 21-183:11; Exhibit R-26 at pp. R-74-76).

11. In language arts class, Student correctly completed homework assignments that demonstrated all of these abilities. Edward Wills (Tr.-208, Il. 4-210:25); (Exhibit R-27 at pp. R-80-83).

12. In science class, Student correctly completed assignments that demonstrated all of these abilities. Deborah Green (Tr.-223, Il. 17-227:17); (Exhibit R-28 at pp. R-99, 101, 105-109).

13. In social studies[1], Student correctly completed assignments that demonstrated all of these abilities. (Exhibit R-23 at pp. R-47-67; Exhibit R-24 at pp. 70-71).

14. After the first nine weeks of the 1999-2000 school year, in early November, Student received a letter grade of F in math, computers, science, social studies, and language arts. Tim Johnson (Tr. 183, Il. 12-14); Edward Wills (Tr.-211, Il.1-3); Deborah Green (Tr.-232, Il. 19-21); Kerry Dixon (Tr.-162, Il.10-16); (Exhibit R-15 at p. R-16); Jacinta Brown (Tr.-51, Il. 12-17).

15. Student received this low grade in each of these classes because he failed to turn in assignments and he failed to complete exams. Tim Johnson (Tr.-183, Il. 15-21); Edward Wills (Tr.-211, Il. 4-20); Deborah Green (Tr.-232, Il. 22-25).

16. Student's teachers made Parent aware of Student's failure to turn in assignments. Parent was advised that tutoring was available and was offered make-up assignments for Student to complete. Jacinta Brown (Tr.-48, Il. 20-49:2; 51, Il. 12-17; 54, Il. 3-55:18; 60, Il. 8-23); Tim Johnson (Tr.-183, Il. 22-11; 185, Il. 15-186:7; 187, Il. 25-188:16); Edward Wills (Tr.-211, Il. 21-212:6); Deborah Green (Tr.-227, Il. 18-24).

17. Respondent provides free tutoring during the week and on alternate Saturdays. Many parents take advantage of these tutoring sessions. They are

informed of these sessions through Respondent's newsletter and through special flyers. Kerry Dixon (Tr.-130, Il. 1-132:17).

18. Student's behavior in classes ranged from no problems in some classes to constant talking and acting as the "class clown" in other classes. Jacinta Brown (Tr.-43, Il. 12-16; 57, Il. 18-58:17); Tim Johnson (Tr.-186, Il. 19-21; 194, Il. 21-196:8); Edward Wills (Tr.-212, Il. 21-213.3); Deborah Green (Tr.-231, Il. 9-13; 234, Il. 20-235:6).

19. Student's teachers used different methods to change Student's behavior, which included moving his seat in class or sending him to an empty classroom to complete an assignment or assigning him to detention. Some of these strategies seemed to help. The teachers contacted Parent to advise her of these behavior problems. Jim Johnson (Tr.-183, Il. 22-184:18; 186, Il. 22-188:8; 194, Il. 21-195:25); Edward Wills (Tr.-207, Il. 5-208:3); Deborah Green (Tr.-231, Il. 9-25).

20. There were four separate disciplinary referrals involving Student. (Exhibits, Exhibit R-16 at pp. R-1819, Exhibit R-18 at p. R-22; Exhibit R-29 at pp. R-132-33).

21. The first disciplinary referral occurred on September 20, 1999. Student and another student fought over who owned a particular calculator. Both students were suspended. Kerry Dixon (Tr.- 123, Il. 12-15; 125, Il. 11-127:7); (Exhibit R-16 at p. R-19).

22. As a result of this first disciplinary referral, Respondent's Principal asked Student to write his account of the incident. The Principal reviewed that document. There is nothing in Student's hand-written account that caused her to suspect that Student had a disability that should be addressed through special education. Kerry Dixon (Tr.-123, Il. 12-124:9); (Exhibit R-18 at p. R-22).

23. As a result of this first disciplinary referral, the Principal met personally with Parent. During this meeting, Parent never expressed any concern that Student may need special education. Likewise, the Principal was not concerned that

Student was in need of special education services as a result of his behavior. Kerry Dixon (Tr.-124, ll. 10-18; 127, l. 22).

24. A second disciplinary referral, on October 22, 1999, involved an incident where Student had been caught cheating on an exam and used profanity in addressing Ms. Green, his science teacher. Student was suspended for three days. Kerry Dixon (Tr.-127, ll. 23-128:10; 129, ll. 10-11); (Exhibit R-16 at p. R-18)

25. The Principal met with Parent after this second disciplinary referral. On that occasion, Parent never told the Principal that she thought Student needed special education services nor did she ask Respondent to evaluate him. Kerry Dixon (Tr.-128, ll.9-129:9).

26. The third disciplinary referral occurred on November 10, 1999, when Student threw food in the cafeteria. Ms. Brown dealt with this incident. Student was suspended for one day. Jacinta Brown (Tr.-43, ll. 21-44:18); (Exhibit R-29 at p. R-133).

27. The fourth disciplinary referral occurred on November 29, 1999, when Student used a study aid to cheat on an exam and also defaced school property by writing on a desk. He was suspended for two days. Jacinta Brown (Tr.-44, ll. 19-45:25); (Exhibit R-29 at p. R-132).

28. Respondent's Principal first learned that Parent wanted to withdraw Student from the Respondent in late November, 1999. This came as a result of a conversation between the Principal and Ms. Brown. During that conversation, Ms. Brown related an earlier conversation she had had that same day with Parent where Parent was upset and did not know what to do with Student and had come to the school to turn in Student's uniform slacks in advance of eventually withdrawing him. After hearing that account, the Principal asked to speak to Parent, but Ms. Brown was advised that Parent had already left the building. As of that date, Student was still a student and had not been withdrawn from the Respondent. Kerry Dixon (Tr.-134, ll. 20-135:25); Jacinta Brown (Tr.-47, ll. 15-24).

29. Approximately one week later on November 29, 1999, Parent withdrew Student from the Respondent. She did this by completing a Transfer Or Withdrawal Form in the office of Stephanie Wakes, Director of Admissions. Ms. Wakes signed that Transfer Or Withdrawal Form on behalf of the Respondent. Kerry Dixon (Tr.-136, Il. 1-11; 137, Il. 3-11); (Exhibit R-1).

30. On November 29, 1999, after Parent completed the Transfer Or Withdrawal Form, both she and Ms. Wakes went into the Principal's office to advise of Student's withdrawal. The Principal asked Parent where Student would attend school. Parent brought up some possibilities, including Wentworth Military Academy and the Paseo Middle School of the Arts. For the first time, Parent then indicated that she also might have Student tested. Kerry Dixon (Tr.-136, Il. 1-137:19; 163, Il. 23-164:14; 171, Il. 1-172:22); (Exhibit R-1).

31. During this same conversation on November 29, 1999, Parent never asked the Respondent to evaluate Student to determine whether he needed special education services. She did not state that she thought Student needed special education services. Kerry Dixon (Tr.-138, Il. 1-8); Jacinta Brown (Tr.-49, Il. 10-50:4).

32. During this same conversation between the Principal and Parent on November 29, 1999, there was no dispute that Student was no longer a student at the Respondent. Kerry Dixon (Tr.-137, Il. 20-25); LaTonya (Tr.-295, Il. 16-20).

33. Prior to November 29, 1999, Parent had never asked the Respondent to evaluate Student to determine whether he needed special education. She never told the Principal or any of Student's teachers that she thought Student needed special education services. At most, she vaguely inquired about the availability of special education services and mentioned that she might have Student tested for a disability after withdrawing him from Respondent. Kerry Dixon (Tr.-138, Il. 9-16).

34. Parent never advised any of Student's teachers that she thought Student had a disability and needed special education. She never requested, of these teachers, that the Respondent evaluate Student. Jacinta Brown (Tr.-49, Il. 22-50:4); Tim

Johnson (Tr.-188, 17-20); Edward Wills (Tr.-213, ll. 8-17); Deborah Green (Tr.-230, ll. 8-24).

35. Petitioner experienced academic failure during his first quarter at Respondent; he had received seven F's and one D prior to his withdrawal from Respondent (Ex. P-5).

36. Petitioner had behavioral problems that contributed to numerous violations of the code of student conduct (Ex. P-4).

37. Petitioner was suspended for a total of 10 days during the fall semester of 1999 for disciplinary infractions related to class disruptions and other disciplinary misconduct (Tr.-258, l. 16).

38. In early November, due to Petitioner's academic failure and recurrent disciplinary problems, Parent asked Ms. Wakes if Respondent offered special education services to which Ms. Wakes responded "no, they did not" (Tr.-261, ll. 11-16), (Tr.-262, ll. 11-13).

39. Parent asked Ms. Wakes if Respondent had any way of testing the children for learning disabilities to which Ms. Wakes replied, "No, not at this time we do not" (Tr.-262, ll. 13-16).

40. Ms. Kerry Dixon is Respondent's Principal (Tr-90, ll.6-8).

41. On November 29, 1999, Parent asked the Principal if Respondent had "anything in place for special education or children with learning disabilities" to which she replied, "Well, no we do not. Not at this time. We are trying to get somebody. We will probably have somebody in here next year" (Tr.-271. ll. 3-8).

42. Respondent has no certified special education teachers on its staff (Tr.-144, l. 7).

43. Mr. Rodney Karns is employed by the Platte Valley Education Cooperation as assistant superintendent for special programs (Tr.-67, ll. 24-25).

44. Mr. Karns met with the Principal in late August to discuss types of consulting services he might provide to Respondent (Tr.-71, Il. 4-7).

45. Mr. Karns sent a letter dated November 8, 1999 to the Principal, which contained his proposal for his provision of consulting services to Respondent (Ex. R-20).

46. On November 12, 1999, Mr. Karns participated in Respondent's in-service training to "initiate a conversation on what special services would be involved at the charter school" (Tr.-119, Il. 16-18), (Ex. R-21).

47. A special education compliance plan is a document that every public school throughout the State of Missouri and the United States has to produce and file, which consists of policies and procedures for the provision of special education services (Tr. 82, Il. 1-4).

48. Respondent has made no referrals for special education evaluations during the current school year (Tr.-84 Il. 17-19).

49. Respondent has not submitted its compliance plan with its policies and procedures for the administration of special education services to the State of Missouri (Tr.-83, Il. 24-25).

50. Respondent is not in compliance with the regulatory requirements of the Missouri State Plan (Tr.-85, Il. 14-21).

51. Parent requested a due process review of the Respondent's failure to provide student a free appropriate public education by letter received by the Missouri Department of Elementary and Secondary Education on or about January 5, 2000, which was more than a month after Student had withdrawn from Respondent and had enrolled in a nearby public middle school. (Tr.-3, I. 13) (Ex. H-2 and H-3).

CONCLUSIONS OF LAW

52. The Hearing Panel's jurisdiction in this case is pursuant to RSMo §162.961.3 and the Missouri State Plan, part II, § VI, page 33, subsection I, which empowers the Missouri Department of Elementary and Secondary Education with jurisdiction to hear special education due process hearings. The relevant language of RSMo §162.961.3 states:

A parent, guardian or the responsible educational agency may request a due process hearing by the state board of education with respect to any matter relating to identification, evaluation, educational placement, or the provision of a free appropriate public education of the child.

53. Respondent's Motion to Dismiss Petitioner's Request for Due Process Hearing is overruled because the motion is based on a Minnesota statute that empowers the local educational agency with jurisdiction for holding a due process hearing rather than the state education agency. Furthermore, the case cited in Respondent's motion is based on the Minnesota Statute §125A.09, which provides in pertinent part:

Subd. 6 **Impartial due process hearing.** Parents, guardians, and the district must have an opportunity to obtain **an impartial due process hearing initiated and conducted by and in the district responsible for assuring that an appropriate program is provided** in accordance with department of children, families, and learning rules, if the parent or guardian continues to object to:

(1) a proposed formal educational assessment or proposed denial of a formal educational assessment of their child; (Emphasis added)

The Hearing Panel concludes that the Minnesota statute has no legal authority or implication on Missouri law or procedure. Moreover, the Hearing Panel notes that the case upon which the motion is based relies upon the fact that the student left the school district and enrolled in a different school district before requesting the due process hearing. The Minnesota statute expressly states that charter schools are treated as a separate school district in

Minnesota. No such statute exists in Missouri. Hence, no evidence exists in the record before this panel that Petitioner withdrew from the Kansas City Public School District before he requested the due process hearing. For all these reasons, Respondent's Motion to Dismiss is overruled.

54. Respondent is a Charter School formed, organized, and operated pursuant to the Charter School Laws of the State of Missouri. RSMo. §160.400

55. Respondent was required to provide special education services to students with disabilities eligible for special education services. RSMo. §160.415.7(2).

56. Petitioner had not been determined to be a student with a disability eligible for special education services and did not have an IEP at the time of the behavior at issue in this matter.

57. The Missouri State Plan provides that each local school district shall submit a compliance plan to the Department of Elementary and Secondary Education, Section of Special Education, a written narrative describing the school district's plan for compliance with the requirements for identifying and servicing all students with disabilities. The plan should include administrative procedures that have been adopted by the district's board of directors and include the following components:

A comprehensive screening program addressing all areas of functioning, including a description of measurement procedures, time lines for implementation, pass/fail criteria, and a description of the analysis and use of the results.

A multidisciplinary, nondiscriminatory evaluation and identification program addressing procedural safeguards, individualized evaluation plans, diagnostic staffing procedures, and eligibility criteria for determination of the handicapping conditions.

In addition, the Missouri State Plan requires that all school districts design and implement a comprehensive, continuous and periodic screening program designed

to identify suspected physical, sensory, behavioral/emotional or other problems which may significantly interfere with a student's capability of achieving educational success. Screening is required in the area of cognitive functioning, including adaptive behavior, and in the area of social/emotional/behavioral functioning. The Missouri State Plan indicates that periodic screening includes the use of systematic or formally administered assessments to compare an individual student's performance and development with his or her peers' performance and development, while continuous screening involves the use of informal observations of an individual student's behaviors to identify possible problems which may interfere with ongoing performance and development as compared to the student's peers.

The Missouri State Plan expressly requires each school to identify an individual responsible for implementation of the screening program, establish specific pass/fail criteria for each area screened, establish local procedures that detail screening schedules for all students in all areas of function and establish local procedures for collecting such information in student records. Finally, the Missouri State Plan requires local schools to develop procedures pertaining to the referral of a student suspected of having a disability to determine the need for evaluation. Those procedures must document the ability and responsibility of teachers, other education personnel and parents to effect a referral for evaluation.

The Hearing Panel concludes that Respondent has not fully complied with the Missouri State Plan, and has not established or adopted adequate policies and procedures for the provision of special education services.

58. If a school district fails or is unable to provide special education services to its eligible students, Missouri law provides that the school district shall contract with a nearby district or districts or public agency or agencies for such special education services. RSMo. §162.705.1.

The Hearing Panel concludes that Respondent is not providing adequate special education services nor has it contracted with an agency or any other entity to

provide services to Respondent's eligible students. Respondent's "agreement to proceed" with Mr. Rodney Karns is not an adequate contract for services under the Missouri statutes and applicable regulations.

59. In early November 1999, when Parent asked Ms. Stephanie Wakes, Respondent's Director of Admissions, if Respondent had special education services to which Ms. Wakes replied no, that was an honest response. Respondent has no special education program as mandated by state law. Respondent does not have certified special education staff employed at the school, has no policies or procedures in place for the implementation of services pursuant to IDEA and the Missouri State Plan, and finally, Respondent has not adequately contracted for the provision of those services as required by law.

60. The facts taken in the totality indicate that Respondent has no special education program and has not provided adequate special education training to its staff.

61. Nevertheless, after considering all the facts taken in their totality, this Hearing Panel determines that Petitioner was not denied a free appropriate public education by Respondent, as a matter of law. The record before this Hearing Panel is devoid of sufficient evidence that Petitioner, as of November 29, 1999, exhibited symptoms or characteristics that would have triggered a special education evaluation as determined by appropriate screening review procedures.

62. Petitioner is not entitled to compensatory services for the time period during which he claims he was denied a free appropriate public education.

DECISION

The Hearing Panel determines that, as of November 29, 1999, Student's academic failures were caused by Student's failure to complete classroom assignments and turn in homework assignments, Student's failure to complete exams, Student's "clowning around" and Student's misconduct in class. Such behavior, however, did not qualify Student for a special education evaluation. Therefore, despite Respondent's failure to provide adequate special education services under the IDEA

and the Missouri Plan, such services were never required for this particular student. Accordingly, Petitioner's request for compensatory education is denied.

This is a unanimous decision of the hearing panel, entered this _____ day of March, 2000, and mailed to counsel for each party by certified mail, return receipt requested, this same day.

Robert K. Angstead, Chairman

Diane Golden, Panel Member

Terry Allee, Panel Member

Notice of Right to Appeal

The law provides that any party aggrieved by this decision may appeal to a court of proper jurisdiction. An aggrieved party may file an appeal in state court by utilizing a "Petition for Judicial Review," pursuant to Chapter 536 of the Revised Statutes of Missouri. That petition must be filed in a court of proper venue (the county wherein the aggrieved party resides, or Cole County) within 30 days after mailing or delivery of the decision. An aggrieved party may also file an appeal in federal court by filing a complaint in a district court of the United States, without regard to the amount in controversy.

[1]Ms. Doris Johnson, social studies teacher, was not called. The Panel took notice, however, of Ms. Johnson's classroom records. (Tr.-239, II. 11-240:2; Exhibit R-23 at pp. 47-67.)