Before the Hearing Panel for the Missouri
Department of Elementary and Secondary Education

, By her parents

, Student/parents

Decision

And

Lee's Summit School District,

District,

I. ISSUES

As it will be clearly shown upon review of the body of this decision below, this panel has elected to take the calculated risk of simplification, in order to deal with the sole actual substantive issue we believe the evidence, documents and testimony in this case to frame. Extraneous matters concerning various issues such as FERPA violations, IEP inadequacies, methodology disputes, teacher qualifications, and the like, were touched upon by respective council for the parties. In our view these additional "issues" did not amount to litigable, or properly joined disputes which were necessary for us to answer in order to address and decide upon the core issue in this case, which was FAPE for a disabled student when she regressed while residing within the school district and failed to recoup the lost skills within a reasonably prompt amount of time.

In accordance with the thoughts stated above, this panel had reduced four days of conflicting expert and party testimony and records to a single issue which can be concisely stated as:

Does the fact that the student regressed in her performance levels on documentary

and testimonial indicia of her present levels of performance make the home district liable to offer or provide modified extended school year services and specified compensatory educational services, when the district failed to meet its burden of persuasion/proof that the regression was caused by factors outside of the district's control?

An issue so interrelated with the above that we treat it as another part of the same single issue amounts to the same question, almost exactly as stated above, which deals specifically with the period of time between the date the student's regression became apparent to the date of the request for due process. The fact that during such time the student's recuperation of the skills she lost in the regression has been slow and she has in fact not regained all skills she lost in the regression by the time the due process request was made makes us ask, "Does this slow and/or partial recoupment of lost skills lead to the district being liable to provide the relief granted herein?"

We believe in a general sense that the additional issues brought out by the parties, as mentioned above by way of example, other than this core issue of the case were, (1) not substantial enough to merit lengthy analysis and decision, (2) had little or no effect upon the student's regression and lengthy period of recoupment, and (3) basically caused no legitimate damage or prejudice to the student or the district, and canceled each other out from the parents to the school's side, due, at least in part, to the schol's provision of services above the legal limits in some instances and in the parents' willingness to formally resist or protest the lack of progress and to stand up for what they believe was best for their daughter.

II FINDINGS OF FACT

1. This Due Process proceeding was initiated by who are the parents of one , a year old female student in the Lee's Summit R-7 School District, on or about May 21, 1999, by letter addressed to MO-DESE c/o Heidi A. Lieberman, Legal Services Section of the Special Education Division, dated May 21, 1999. (Pl. Ex. 8

(F); R.Ex.3; Tr.30, 585)

2. The Due Process hearing on the matter was postponed at the request of the district, to September 21-24, 1999, which continuance was opposed by the parents. An arrangement was reached between the parties' respective counsel and the chair of the hearing panel whereby the full continuance requested by the district would not be granted and the compromise dates (above) would be inviolate absent mutual agreement otherwise. A "Request for Exentions of Time Lines" bearing certificate of service dated June 9, 1999, was filed by district attorney which was granted, as amended to reflect the dates stated above, and a deadline for decision upon the 8th of October. This deadline was extended by agreement of both parties in writing, to Thursday, October 14, 1999, to accommodate the respective counsel's post hearing briefing of the case.

3. Student's most significant diagnosis are autism and a seizure disorder, which places this cause within the jurisdiction of the IDEA statutes. Such diagnosis were not contested or disputed by an substantial evidence. (R.Ex. 24; Tr. 1030)

4. Parents' attorney Sonja Kerr is not an attorney duly licensed to practice law in the State of Missouri, but did duly petition the Supreme Court of the State of Missouri for leave to practice in this state on this case, which request was deferred by the Clerk of the Supreme Court of Missouri to this hearing panel. This hearing panel, insofar as it has the power to do so, grants leave for Ms. Kerr to practice law in this state before this panel for this particular cause. (Tr. 14-16)

5. A regression in pre-academic, social, language and life skills of the student occurred at some point after the return of the student to the Lee's Summit School District from the Lawrence program in March of 1998 and before the start of the regular 1998-99 school year. (Tr. 185-186; 307; 453; 743-744; 764-800: P.Ex.5(A); 5(B); 5(C); 59)

6. Throughout the Fall of 1998 and Spring of 1999, the recoupment of the skills lost in the regression mentioned in the preceding fact was slow, and by the time the IEP for the school year 1999-00 was under construction in the Spring of 1999, there were still skills and achievements that had been recorded in the student's records prior to her Spring '98 return to the respondent district, which had not yet been recovered or regained. (P.Ex. 3(B); 5(A); 5(B); 5(C): Tr. 35-36; 441, 693-700)

7. The parents, as well as the student's primary teacher in the 98-99 school year, corroborated each other in their testimony that they believed that the student was doing well and that they were pleased with her progress until the time she returned to district for the Kindergarten program in the fall of 1998, after a three wek break between the end of the Early Childhood summer school program and the start of the 98-99 school year. (Tr.185-186; 307; 453; 602-603; 764-801)

8. This panel could not find any procedural violations by the district of such a substantial nature so as to constitute a failure to render F APE to the child, and it is likewise found that the parents were afforded substantially all of their due process rights in this cause.

9. The parents and the student were afforded by the district all or substantially all rights and privileges, both substantive and procedural, demanded under the IDEA statutes, with the sole exceptions of the fact of the regression and the long term recoupment period for the student. (p. Ex. 59; 5(A); 5(B); 5(C); Tr. 743-744)

10. Student's primary teacher at district in the fall of 1998, was one Ms. Rachel Cahow, who admitted that student had suffered a regression at the beginning of the 1998 school year. (Tr. 794-801; 453; 307; 767-769; 185-186)

11. Ms. Laurel Bohl, student's OT during both the summer and fall of 1998, testified that student had suffered a relapse or regression in skills between

the summer session and the fall session 1998. (Tr. 764-801)

12. On Wednesday, September 22, attorneys of the parents closed their case in chief, and announced for the record that they had presented all evidence they desired to present at that time, reserving a period for rebuttal evidence, if any, after the district had closed its case in chief (Tr.537-538)

13. On Friday, September 24, attorneys of the district closed their case in chief, and announced for the record that they had presented all evidence they desired to present at that time, reserving a period for rebuttal evidence, if any, after the rebuttal evidence, if any, of the parents. (Tr.1003)

14. It is found by this panel that the best way to meet the student's needs under circumstances such as those presented at the hearing, is to insure that there are no substantial gaps in the student's education such as occurred between August 6, 1998 and August 26, 1998, and to provide additional educational opportunities to the student to ameliorate her unreasonably long recoupment of skills.

15. At issue during the pre-hearing conference, and prior to the presentation of any evidence by either side, was the question of the order in which the parties would present evidence. Parents stated they had assumed they would respond to the district's case in chief, whereas the district was prepared to follow the parents in presenting evidence. It was moved by the parents that the district should be the first to present their case. That motion was overruled, and the basis for that ruling was that the parents appeared to be the proponents of a change in the status quo of the parties. (Tr. 6-14)

16. The initial panel member selected by the parents, one Marilyn McClure, had resigned her position as a panel member in this hearing, and upon the parents , request, one Ms. Donna Dittrich had graciously, and at the last minute, agreed to so serve, and was present in person. Her membership in this panel was

not challenged by any party and therefore she is recognized as a member of this panel. (Tr. 5)

III. DECISION

It is the decision of this panel to issue an opinion in this matter in favor of the parents in part, and in favor of the district in part. We find there to be no preponderance of the evidence or satisfied burden of persuasion as to the cause of the child's regression (which most significantly occurred during month of August 1998), but we likewise find that the child did regress during the period that she was under the educational care of the district, and that said regression was followed by an extensive period of recoupment.

The decision of this panel in favor of the district is as follows. The methodology issue has already been decided and we will not disturb the rule that gives the district discretion in that area. For purposes of clarity we have numbered the black-dotted line items on the parents' request for Due Process (pi. ex. 8(F)). For numbers (1) and (2), it appears that the child is receiving in excess of 35 hours per week of educational instruction, and that she attends school five days per week for at least (6) hours per day. We also find the ESY in the proposed '99-'00 IEP to closely approximate the 12 month program demand, especially when taken with the relief granted in this decision. Items numbered (3), (4) and (5) clearly fall within the definition of teaching methodology, and are therefore denied. Number (6) either infringes on teaching methodology, or is already being provided, as is the case with the P/T and O/T services. We see no evidence that the teachers or the experts employed by the district in the case were either unqualified or inexperienced in the educational treatment for an autistic child. Numbers (7), (8) and (9) fall into the domain of methodology and are denied. Number (11) will be addressed (infra). Numbers (10) and (12) are found to be within the area of methodology, and in addition it is found that the district did in fact exceed its legal duty of communication with the parents, and therefore these two items are denied. Number (13) is found to be without the scope of relief offered under IDEA, in that it

was not proved that this item of relief was necessary to the child benefiting from her education, nor was it proved that the existing health care was inadequate. Items numbered (14) and (15) appear to be substantially in place in the existing curriculum, and are therefore denied. Finally, item numbered (16) is found to be under the methodology category, or in the case of reverse mainstreaming, CPR-trained personnel, and air conditioned, secure facility, moot, because already substantially in place, and is therefore denied.

The item numbered (11) on the parents' Due Process Request is found to have application to the creation and nature of the EIP for the child, and although no specific relief is granted in this regard, it is noted by the panel that the law requires such criteria to be included.

The decision of this panel in favor of the parents is premised upon the fact that the child did regress and suffer an extensive period of recoupment of skills while residing within the Respondent district, and while she was under an IEP created by/for the district. Although this panel is persuaded that the most significant decrease in skills occurred sometime between the end of the Early Childhood summer program in 1998 and the beginning of the regular Kindergarten year in Fall 1998, we believe that the district is, at least in part, legally responsible for this regression and extensive recoupment period.

The law appears to require the district to "provide sufficient specialized services so that the student benefits from [her] education". Ft. Zumwalt. citing Rowley 458 U.S. @ 195 Regression and an extensive period of recovery of lost skills do not, by definition, amount to a net educational benefit. Practically, the lack of educational benefit amounts, for purposes of this decision under these specific facts, to the child failing to receive a free and appropriate public education. The facts that the summer 1998 program provided to the child by the district failed to prevent the regression aforementioned, and the extended period of recoupment of skills that followed, forms the foundation for the relief ordered herein and should be considered the basis for our finding a lack of F APE in this instance, as well. For

these reasons, compensatory education and Extended School Year relief is awarded, as is more specifically set out below.

A. Relief Granted

1. The student is granted compensatory education in an amount of eight, 31/2 hr. Saturday sessions by the end of the regular school year in May of 2000. In absence of the agreement of the District and the parents, these sessions shall be conducted starting between the hours of 9:00 a.m. and 11 :00 a.m., on the Saturday morning of December 4, 1999, and not less often than every third Saturday thereafter, until all eight Saturday sessions have been completed. Additionally, unless otherwise mutually agreed between the parties, this time for student shall be with a student/teacher ratio of at least one teacher to the student with no other students present, and at the location of the school district, and shall be for the implementation of such topics or skills as may be agreed between the parties or in absence of mutual agreement, for working on the currently identified individual educational program goals and objectives for the student.

2. In addition, the student will have extended school year education for the Summer of the year 2000, wherein no more than one week at a time shall the student be on vacation or out of the educational setting and which extended school year shall begin not later than one week after the end of the regular school year in May of the year 2000, and end not more than one week prior to the beginning of the new 2000 to2001 regular school year.

3. All transportation for the additional educational opportunities granted herein shall be the responsibility of the district.

CONCLUSION

This panel would like to express its clear intention that in rendering a decision for both parties in part, and in granting the limited relief contained herein, we hope

that neither party will be found to have gained a substantial victory in this matter. It appears that the district provided services and efforts towards the education of the student above and beyond the legal requirements in many instances, but that such efforts were inadequate to prevent the regression or to recoup the lost skills within a reasonably short time frame. We make no finding as to specifically what caused the regression or the lengthy period of recoupment of skills. Even though the district has offered several theories on this point which would tend to lay the blame elsewhere, we remain unconvinced. However, it is our understanding of the relevant law that while a child is located within any given school district, and is disabled to the extent of the student in this case, the district has a legal responsibility to provide such special educational curricula and services so that the child benefits from her education. We cannot escape the definition of "educational benefits" being very different from that of "regression" and a year long recoupment period. We believe that the responsibility for this is upon the school unless the school meets a burden of proof or persuasion that something other than the school's programs or services were responsible for the negative effects upon the child.

Maybe this is too large a leap of reasoning, and this decision will be second guessed and tom apart as many others have been. Even if that becomes the case, very little harm would be done, and perhaps some clarification upon this point can be had.

We salute the school and its efforts and applaud the parents' perseverance in attempting to protect their child. We believe that at some point in this matter, contentions and control issues may have superceded the best interests of the child. We note that the time that the lawyers became involved in this matter, was the time at which matters appeared to get substantially worse, and that a twenty five member IEP team is one whose chances of easy success and unanimity as to the best interests of the child are slim. We wish the parents and the district luck and hope that they will revisit these issues in a spirit of compromise and dedication for

David Potashnick, Panel Chairperson

Ms. Donna Dittrich, Panel Member

Mr. George Wilson, Panel Member