

HEARING DECISION
COVER SHEET

Re: V. LIBERTY 53 SCHOOL DISTRICT

Student: (DOB:)

Parents:

Parents' Counsel: Edward F. Ford, III
Ford & Cooper, P .C.
110 N.W. Barry Road, Ste. 201
Kansas City, Mo 64155

School District Counsel: Teri B. Goldman
Blackwell, Sanders, Peper, Martin, L.L.P
720 Olive St., Ste. 2400
St. Louis, Mo. 63101

Panel Members: Terry Allee
Rand Hodgson

Panel Chair: J. Michael Cato
P .O. Box 668
Advance, Mo. 63730

Due Process Request Received: August 6, 1999

Due Process Hearing Held: October 19, 20, 21,1999, December 16 & 17, 1999.

**BEFORE THE DEPARTMENT OF
ELEMENTARY AND SECONDARY EDUCATION**

IN THE MATTER OF;)

.,)

)

Petitioner,)

)

vs.)

)

LIBERTY 53 SCHOOL DISTRICT,)

)

Respondent.)

)

FINDINGS OF FACT , CONCLUSIONS OF LAW,
DECISION AND ORDER.

The hearing panel, after hearing the evidence in this matter makes the following findings of fact and conclusions of law and issues the following decision and order:

FINDINGS OF FACT:

1. The Student, at all times relevant to this due process proceeding, residing with his parents within the boundaries of the Liberty 53 School District (hereinafter "School District").

2. The School District is a reorganized School District organized pursuant to the Revised Statutes of the State of Missouri.

3. The hearing panel members in this due process proceeding are as follows:

Michael Cato, Hearing Chairperson

Dr. Terry Allee, Hearing Panel Member

Mr. Rand Hodgson, Hearing Panel Member

4. Counsel for the parents: Edward F. Ford, III, Ford & Cooper, P.C., 110 N.W. Barry Road, Ste. 201, Kansas City, Mo 64155.

5. Counsel for the School District: Teri B. Goldman, Blackwell, Sanders, Peper, Martin, L.L.P., 720 Olive Street, Suite 2400, St. Louis, Missouri 63101

6. Student was first enrolled in the School District as a kindergarten student for the 1988-1989 School Year. Student was promoted to the First Grade for the 1989-1990 School Year. Student did not receive any special services during the 1988-1989 or 1989-1999 School Years.

7. Student was first evaluated by the School District for eligibility for education services during the 1990-1991 School Year while the Student was enrolled in the Second Grade.

8. Student underwent an independent "Psychoeducational Evaluation" by Dr. Fowler Jones in February/March 1991. The evaluator concluded that student required learning disability services and further that the student had a 'mild' case of Oppositional Defiant Disorder.

9. The multidisciplinary team concluded that the Student was learning disabled in reading and spelling and recommended that a behavior management plan be developed to address behavioral concerns. The initial Individual Educational Program (hereinafter "IEP") was developed for the Student on April 2, 1991.

10. Student received services from IEP's developed annually for each school year beginning with the 1991-1992 school year and continuing through the time of the hearing.

11. School District performed a reevaluation of the Student during the 1993-1194 school year. The multidisciplinary team concluded that the Student meet the criteria to be classified as learning disabled in reading and spelling. The team further noted that the students "behavior" was of some concern. An IEP was thereafter developed for the student.

12. In early 1997, School District performed a reevaluation of the Student. The multidisciplinary tam concluded that the Student meet the criteria to be classified as learning disabled in reading comprehension, basic reading skills, written expression and math calculation. The students behavior again was a noted area of concern. An IEP was thereafter developed for the student.

13. During the Students ninth grade year a behavior plan ("Plan for Success") was developed and implemented due to continuing concerns regarding the students behaviors.

14. On April 27, 1998 an IEP team meeting was held to develop the IEP for the student for the 1998-99 school year. The Student would begin attending School Districts "High School" (Grades 10-12) during the 1998-1999 school year.

15. During the 1998-1999 Student began experiencing difficulties in Geometry class. The Students IEP team held a meeting on the second day of the school year to discuss the behaviors exhibited in Geometry class. The students IEP was modified to allow the student extra time with the Geometry teacher twice each week, prior to the beginning of the school day, and providing for the Geometry teachers' notes to be made available to the Students Special Education teacher.

16. On September 19, 1998, the Students' IEP team convened yet again. During this meeting Student's Parents requested the School District to provide Student with a Class-Within-A-Class (hereinafter "CWC") for geometry. The IEP team convened on September 21 and again on September 29, 1998 to discuss behavioral concerns as well as the parents request for CWC services in Geometry.

17. In October, 1998 the Student was assigned to a different teacher for Geometry and a behavior plan was developed to address the behavior concerns in this class. The School district provided for a special education teacher to be made available to the Student during Geometry class. However, Student was removed from Geometry on several occasions for inappropriate behaviors. Student received a passing grade for his first semester in geometry.

18. During September, 1998 the Students parents consented to Psychological testing for the Student. On October 21, 1998 the Students parents withdrew authorization for psychological testing.

19. On January 21, 1999 the IEP team again convened to consider several requests made by the students' parents. The IEP team agreed to provided CWC for the student in American History and English. The team did not agree to several other requests and the parents received written Notice of Action Refused for the following: Two hours of remediation in written language and reading per day; 50 hours of remedial instruction in reading and written language during the summer; one hour of instruction per day in higher math in a small group or 1 : 1 setting; reading and written language remediation for credit in upper level English; training for teaching staff regarding Oppositional disorder and foreign language instruction in a small group or 1 : 1 setting.

20. On February 5, 1998 the Students parents provided the School District with notice of intent to provide an alternative education program for the student. On March 5, 1999 the Students parents notified the School District of their intent to home school the Student and provide private tutoring in mathematics and reading.

21. On February 9, 1999 the Students parents were notified of the School District intent to perform a reevaluation. The Students parents consented to the reevaluation, but latter revoked any consent for "Cognitive" testing.

22. On March 11, 1999, the IEP team met to consider the reevaluation results. School District personnel voiced concerns regarding the Students behavior while the Parents questioned disregarding results of several tests administered to Student

based upon being the test results being deemed "invalid". The School District maintained that based upon the "Valid" portion of the testing the Student should be reclassified as "Behavior Disorder/Emotional Disturbance" (Hereinafter "BD/ED") rather than the previous Learning Disabled (hereinafter "LD") classification. The School District further maintained that the Student met the criteria as disabled only in the area of written expression. The Students Parents disagreed and the IEP team was unable to reach a consensus.

23. The Students' Parents requested an independent evaluation for the Student. On May, 1, 1999, a independent evaluation was completed by Dr. Fowler Jones. Dr. Jones concluded that the Student had a "Reading disorder, Written Expression Disorder, Mathematics disorder, Oppositional Defiant Disorder, Anxiety Disorder and ADHD."

24. The IEP team met on May 25, 1999 to review and consider the result of the Independent Evaluation. On June 1, 1999 the IEP team met to present the Student's parents with a proposed IEP. The Students' Parents the following requests to the IEP team: " 90 minutes of remediation in reading and written language per day during the school year; 50 hours of instruction in reading and written language during the summer months; One hour of instruction per day during the regular school year in higher math (geometry, algebra n and pre-calculus with trigonometry) in a small group or 1 : 1 setting; Use reading and written language remediation for credit Language courses: Training for teachers regarding Oppositional disorder; Foreign Language instruction in a small group or 1: 1 setting. Each of the parents requests were denied by written notice of action refused.

25. On, August 6, 1999, the Students Parents requested due process and this hearing ensued.

26. Student is currently enrolled in the following course work at School District: Graphic Design, Contemporary Literature, Algebra II, Applied physics, Special Education socialization, Studies Skill and World History. Student is currently receiving passing grades in all subject matters.

27. Students' IEP dated August 28, 1998 provided for 500 minutes per week of "CWC" Special Education Services. During the 1998-1999 Student received "CWC" services in American History and Communication Arts". During the 1999-2000 Student has received 500 minutes per week of Resource Itinerant Services rather than "CWC" services.

28. On November 23, 1999, the IEP team convened and drafted an IEP for the Student. Although notified of the meeting, the Students Parents did not attend.

ISSUES AND PURPOSE OF THE HEARING

Parents raised the following issues, by way of a Post Hearing Brief, dated January 7, 2000:

1. The School District incorrectly diagnosed Student as Behavior Disordered/Emotionally Disturbed.
2. The School District has failed/refused to recognize that Students learning disability manifests itself in an imperfect ability to learn in areas other than his written language and includes disability in areas of reading and mathematical calculations.
3. School District has failed to provide services required to address the Students educational needs stemming from his learning disabilities.
4. As a Result of the School Districts failure to properly recognize or diagnose the Students problem areas of reading and mathematical calculation, it has refused any request for services to address these problems.
5. In the Area of written language diagnosis the services provided are not adequate and do not provide the Student with Free Appropriate Public Education (Hereinafter "FAPE").

That the following services are required:

a) **For Reading Disorder**: A Special Education Teacher should Plan lessons on improving reading achievement, and be responsible for ensuring various reading skills are taught. Provide systematic instruction primarily designed to remedy reading skill deficits in addition to instruction incidental to Student completing reading assignments from regular education classes.

b) **For Mathematical Calculation Disorder**: Specialized instruction is needed to help Student benefit from math curriculum including specialized help from the Special education Teacher along with appropriate accommodation for regular classroom instruction.

c) **For Disruptive Behavior**: A Consultant is needed to develop and adjust an ongoing behavioral plan. The Behavior Management Plan should not allow for systematic exclusion from the classroom.

d) **For Written Language and Reading Disorders**: Extended School Year Special Education Services are required.

6. School District has violated Procedural Safeguards which have resulted in harm to the Students Educational progress and has violated the "Stay-Put" IEP in the following manner:

a) A School District representative who could direct the instruction program at the School District was not present at the spring 1998 IEP meeting.

b) School District failed to provide Students parents with Written Notice of Action Refused for CWC for Student in the area of math during the 1998-1999 School Year.

c) School District is not following the "Stay-Put" IEP in that the Student is receiving 500 minutes of Resource Itinerant services rather than 500 minutes of CWC services, which amounts to a change of placement in that the child is in a more restrictive environment.

d) The emphasis on special instruction time given to various goals and objectives have changed. The Student is not receiving adequate special education assistance with the goal of meeting curriculum requirement in mathematics or science.

7. Requiring the School District to reimburse Students Parents for the costs of providing tutoring to the student from the spring 1999 semester through the time of the hearing.

8. Requiring the School District to pay the Students Parents Attorneys Fees incurred herein.

TIMELINE INFORMATION

The request for due process was received on August 6, 1999 with the original deadline for the holding of the hearing and mailing of the decision being September 20, 1999. On September 8, 1999 a request was received on behalf of the School District requesting an extension of the hearing timelines. The extension was granted, over the objections of the Petitioner, and the timelines for both the hearing and decision were extended up to and including November 15, 1999. By agreement of the parties, this matter was set for hearing beginning October 19, 1999. Hearings were held October 19-21, 1999. It then became obvious that additional time would be required to hear all the necessary evidence. On August 21, 1999, while on the record, the School District requested an extension of the hearing timelines. The extension was granted, over the objections of the Petitioner, and the timelines for both the hearing and decision were extended up to and including January 30, 2000. By agreement of the parties, the matter was set for hearing beginning December 16, 1999. Hearings were held December 16 & 17, 1999. On January 29, 2000, the hearing chair, acting on separate requests of the parties (extended the timeline for rendering and mailing of the decision up to and including February 15, 2000.

PANEL MEMBERS

Original members of the due process panel were: Michael Cato, chairperson, Dr. Terry Allee, Panel Member and Mr. Rand Hodgson, Panel Member.

CONCLUSIONS OF LAW

The School District provided the Student with a free and appropriate public education for the 1998-1999 School Year in that an Individual Education Program was developed and implemented for the Student which was designed to meet the unique needs of the student, further that the Student enjoyed the necessary services and support needed to make academic progress during the 1998-1999 School Year .

That insufficient evidence was adduced to allow for the student to be classified as "Behavior Disorder/Emotional Disturbance". However, this panel notes that both parties indicated some concerns relating to the behavior of the student and further that both of the independent evaluations of the Student revealed some behavior concerns. It appears that independent psychological testing of the Student would be appropriate. The results of said testing shall be provided to the Students IEP team for use in formulating an appropriate classification and use in completing an appropriate IEP and Behavior Management Plan for the Student.

That based upon the testimony adduced this panel finds and concludes that the Student meets the criteria for disability ONLY in the area of Written Expression. Student does NOT meet the criteria for disability in the areas of reading and mathematical calculations. The panel finding as credible the consistent testimony of the Students teachers regarding performance associated with reading and mathematical skills. This panel also notes that the Student is enrolled and is progressing in advanced mathematics and science classes.

The services and supports provided to the student in the area of Written language disability are appropriate and do not deny the Student a "Free Appropriate Public Education" in that area.

That no additional services or supports are necessary in the areas of Reading Disorders and Written language Disorder. The Panel specifically finds that Extended School Year services are not necessary.

The panel finds no legal authority for any change in criteria in determining a Students eligibility for special education services in an "Reevaluation" versus an "Initial" determination .

The panel finds and concludes that based upon an admission of the School Districts own witnesses, the School District failed to have a representative, who could direct the instruction program, at the spring 1998 IEP meeting. The panel notes that the child continued to make academic progress under the IEP formulated at the spring 1998 IEP meeting. The panel concludes therefore, that the student suffered no harm as the direct result of this failure and therefore no relief is justified based upon this claim.

The School District failed to provide the Students parents with a Written Notice of Action refused in relation to CWC service in Students math class for the 1998-1999 School Year.

The panel concludes from the extensive involvement of the Students parents in the IEP formulation and Implementation process that the parents were well aware of the services being provided to the Student. The Panel notes that several IEP meetings were held to discuss services provided to the Student in Math class together with his behavior problems therein. The panel also notes that the School District did provide the Students parents with some fifteen other Written Notices of Action Refused. The Panel finds that the Student suffered no direct harm as a result of the School Districts failure and therefore, no relief is justified based upon this claim.

The Panel finds no evidence to support the contention that the School District failed to properly consider the findings of the Independent Evaluator. The weight of the testimony points to the conclusion that the IEP team considered the finding of the evaluator, but rejected the findings and recommendations.

During the 1998-1999 School Year, the Student was receiving some 500 minutes of CWC services per week. Students Parents requested Due Process in August 1999 and thereby invoked the "Stay-Put" provisions of the IDEA. During the current School Year, Student is receiving 500 minutes of Resource Itinerant Services rather than CWC services. The Parent contend that this change amounts to a more restrictive environment and, is in violation of "Stay Put". The panel notes that the goal of the IDEA is to ensure that the School District provides the services and supports necessary to allow the disabled Student to make academic progress. While the student may not be receiving the CWC services as in the prior academic years, he is also not enrolled in the same courseware. The Student continues to make academic progress in his Mathematics and Science courseware. The services and supports which the student is currently receiving is not a change of placement and therefore no compensatory time is justified.

The panel finds no evidence to support an award of reimbursement of the costs of tutoring the Student. The panel finds that the Student was making sufficient academic progress prior to the institution of the Tutoring program. The panel notes that .the student is enrolled in more advanced classes in both mathematics and Science and continues to mak4~ academic progress, with little or no increase in the tutoring time received by the Student. Therefore, the panel concludes that based upon the prior academic progress of the student that no award of Tutoring costs are justified.

The panel has no ability to award Attorneys fees in these matters.

DECISION AND ORDER;

That the Student shall undergo appropriate psychological testing administered by an Independent Evaluator. The Evaluator shall be mutually agreed between the parties and shall administer such test as the Evaluator deems necessary and appropriate to gauge the Students emotional needs. The School District shall be responsible for the costs of said psychological testing.

The results of said testing shall be provided to the Students IEP team for use in formulating an appropriate classification and use in completing an appropriate IEP and Behavior Management Plan for the Student. Further, that the School District shall reconvene the Students IEP team within 14 days of the receipt of the results of the Independent Evaluation.

The School District provided the Student with a free and appropriate public education for the 1998-1999 School Year.

That Petitioners are not entitled to reimbursement for their costs of tutoring the Student.

That the no compensatory services or supports are necessary.

The School District shall reconvene the Students' IEP team to develop an appropriate Behavior Management Plan in conjunction with the results of the Independent psychological evaluation.

All other requests for relief are hereby denied.

APPEAL PROCEDURES:

Any party aggrieved by the decision of this panel may, pursuant to Chapter 536 of the Missouri Statutes, appeal this decision to a state court or a federal court, within 30 days of the date of the decision.

FOR THE HEARING PANEL:

(Majority)

J. Michael Cato, Hearing Chairperson

Dr. Terry Allee, Panel Member

BY:

J. Michael Cato, Hearing Chairperson

(Dissent)

Mr. Rand Hodgson

CERTIFICATE OF SERVICE

the undersigned certifies that a copy of the foregoing was served upon each party to this action, TO-WIT;

Edward F. Ford, III
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110 N. W. Barry Road, Ste. 201
Kansas City, Mo 64155

ATTORNEY FOR PARENTS

Teri B. Goldman
Blackwell, Sander, Peper, Martin, L.L.P .
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ATTORNEY FOR SCHOOL DISTRICT

by depositing same in the United States Post Office in Advance, Missouri, with sufficient postage, on this 15 Day of February, 2000.

Dissenting Opinion

These are the areas of disagreement I have with the pane1.

1. Did the school fail to provide a written notice of action refused and did an LE.A. attend the IEP in the spring of 1998?

2. Did the lack of CWC services in the 1999 school year effect the student or the contention that this change was a violation of stay put? If so, are compensatory services of reimbursement required?
3. Did the student qualify as L.D. in Math operations or calculations by standardizing testing and observations? Were the outside evaluations considered by the I E P team?

As for question number one, the evidence shows clearly that there were numerous procedural violations on behalf the school district. The notice was not provided and an

Lea was not present at the Spring IEP. Also, the Behavior Intervention Plan, known as

BIST was clearly created outside the IEP. The behavioral interventions were not positive, rather the plan was written to exclude him out of the math class. I'm greatly concerned when any school district steps allover a student and parents rights procedurally and this panel says no harm is done. The evidence shows that the student was separated from his math class for over a month.

Question two addresses the violation of LRE and of changing the minutes and not following the minutes agreed upon on his current IEP. The spring 1998 IEP states that

750 minutes of CWC are to be provided for the next IEP year. In August 1998, the new IEP team met and changed the minutes to 500. However, evidence shows from then to the hearing date, CWC was not provided as stated on the IEP. Rather services were provided in a segregated, self-contained classroom. LRE was not considered and the student was served in a less than appropriate setting. For this student, who already had self-esteem issues, this created a problem. The student does not like to be separated from his peers when he should ha\'e been served in a regular CWC classroom. I believe the student is entitled to compensatory services for the lack of CWC as required. The amount required would match the amount not provided as stated on August 1998 IEP.

Question three is a difficult question. The school in previous years identified the student as LD in Math operations. During the testing of the Key Math there was determined to be a compliance issue, so the test was deemed invalid. After the Key math was deemed invalid, another test specifically for math would have addressed this question. Evidence states that the Toma would address this question appropriately. However, only in the independent evaluation \was the Toma used. Dr. Fowler Jones brought the results of this test to the IEP team in the spring of 1999. I asked many questions about how the IEP team considered this independent evaluation. I never received any answer from any of the IEP Team to show how it was considered. There was conflicting testimony by the IEP team, some believed he had problems with basic math operations while others did not. In this case I would suggest the Toma should have been relied upon. In fact, testimony by the plaintiffs states, the Toma was not considered.

The panel wondered why a student with a learning disability in math, would attempt a high-level math class. We all assume the student would most likely avoid that course if they could. In this unique case, the parents and the student chose to attempt to overcome the disability and take the course to prepare for college. The parents contracted for tutoring and personally spent hours every night with homework.

Given the Toma results and the evidence presented, I believe that this student qualifies for L D's Math Operations.

Dissenting opinion

Rand Hodgson