

BEFORE THE MISSOURI DEPARTMENT OF
ELEMENTARY AND SECONDARY EDUCATION

PETITIONER _____,

Petitioners,

v.

COLUMBIA 93 SCHOOL DISTRICT,

Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW & DECISION

This case was brought on behalf of Petitioner ____, a young boy receiving Early Childhood Special Education in the Columbia Public Schools. The claim is that the Columbia Public Schools ("District") failed to provide him a free and appropriate public education and that certain procedural violations were made. The District denies the claims.

This matter was heard by a three-member panel, Ivan Schraeder, Chairman, George Wilson and Rand Hodgson, Members, convened in accordance with relevant statutes of the State of Missouri and rules and regulations of the Department of Elementary and Secondary Education. The hearing was held with proper jurisdiction in the panel. Petitioner appeared by his parents and was represented by counsel. Respondent appeared and was represented by counsel. After reviewing the testimony presented by Petitioner and Respondent, the exhibits admitted into evidence by stipulation or otherwise, and the arguments of counsel, the Panel makes the following findings, under the law as it existed at the time that the operative facts arose:

FINDINGS OF FACT

1. Autism is a neurological disability. It is a spectrum disorder, which affects each child differently in terms of mental abilities, sensory problems, and communication.
2. Autism is a clinical syndrome and there is no big-medical marker to identify autistic individuals. Autism frequently occurs with other syndromes, diseases and developmental disabilities including mental retardation.
3. The characteristics of autism may be present with other disorders.

4. ___ are the parents of Petitioner. ___ is a physician who practices in the area of family practice.

___ received her undergraduate degree from the University of Michigan and completed 18 of the 22 required hours toward her Masters Degree in Education. She has taught at the community college level and was certified and did long-term substitute teaching, K-12. She now devotes her time to raising her children 1198:21-1200:12,

5. Petitioner was born in Montana on ___, at 25 weeks of gestation.

6. At birth, Petitioner weighed 1 pound, 11 1/2 ounces. He has a significant medical and developmental history. He was in the Intensive Care Unit for over 14 weeks where he was incubated and on a ventilator for 18 days. From April of 1993 through April of 1994 he had gastroesophageal reflux. He was diagnosed as failure to thrive and had feeding difficulties which persisted through March 21, 1997. He was developmentally delayed, had a seizure disorder and several surgeries prior to March 21, 1997. His seizure disorder was diagnosed both by clinical observation and EEG.

7. Petitioner and his family have received services from a variety of sources prior to and during the time they came to the District, which was prior to and after November 1994 when they moved to Columbia. While they were living in Montana, Petitioner received services from

Quality Life Concepts and participated in the Montana Deaconess High Risk Infant Screening.

Petitioner also received both speech therapy and occupational therapy while he lived in Montana.

Before the ___ moved to Missouri, Mrs. ___ was in contact with the Missouri Department of

Mental Health and Petitioner began receiving services from the Missouri Department of Mental

Health via the First Steps Program immediately after the ___ moved to Missouri. When the ___

moved to Columbia, Petitioner was 26 months old.

8. On April 3, 1995, at the age of 30 months, Petitioner was evaluated at the Special

Needs Clinic of the University of Missouri Hospitals and Clinics by Carolyn Terry, MD.

9. In her April 3, 1995, letter, Dr. Terry stated, Petitioner has significant motor and language delays and we are concerned, as I know you are too, about the possibility of cognitive delays.

His motor delay can be ascribed directly to his premature birth; however, his severe expressive

language delay and his deficits in social/adaptive behavior, combined with several of his mannerisms, do suggest a Pervasive Developmental Disorder. I think it unwise however to assign such a diagnosis to him at this point. He is very young, he was very premature and he has had no formal testing to confirm such a diagnosis. Such testing should be done only when we feel that he has adjusted adequately to the situation where we would want to have him evaluated.

10. The ___ shared this April 3, 1995, report and letter from Dr. Terry with the District in the summer of 1995 during Petitioner's evaluation for Early Childhood Special Education.

11. Petitioner was seen by Dr. Terry again on July 10, 1995. In her July 10, 1995, letter, Dr. Terry stated that she spoke to Petitioner's private occupational therapist and his private speech therapist who "both agree that he [Petitioner] is showing steady progress." Dr. Terry also said, "I myself see some nice improvement in his social skills and communicative behavior". Dr.

Terry went on to say:

I am sure ___ understands and agrees with our position that we can't predict with any useful accuracy how much recovery Petitioner will make. Since he is showing such positive gains now, I am not willing to put any limits on his eventual performance. I have a sense that we cannot expect him to reach normal functioning for his age. I believe that the single most limiting factor will be his cognitive ability and as you are aware, we are worst of all at predicting that with any accuracy at this age. We must avoid interpreting social and language delays as cognitive delay. Yet, on the other hand, we must realize that cognitive delay may be responsible for his other symptoms.

After providing the above comments about Petitioner, Dr. Terry gave the ___ advice about the upcoming IEP meeting. She stated,

Remember to examine his IEP critically. You are entitled to take a copy of that home and look it over together. If there is something you would like to see and if that isn't there you should ask for it. He will not receive a specific diagnosis for Early Childhood Special Education Program. Certainly, OT, speech and PT should be included, as well as cognitive stimulation and you will want to be sure that the school understands how you want his mouth and feeding skills handled.

On July 20, 1995, with assistance from his mother, Petitioner participated in a Transdisciplinary Play-Based Assessment as part of his evaluation by the District. The members of the District's evaluation team included a psychologist, a speech/language therapist, an occupational therapist; and a special education teacher. The assessment found that Petitioner had delayed cognitive skills in relation to chronological age peers, that Petitioner demonstrated significant delays in functional fine and gross motor skill development, that Petitioner's speech and language skills were delayed compared to his chronological age

13. The District found that Petitioner was eligible for Early Childhood Special Education (ECSE) services.

14. On September 27, 1995, a team of individuals including the parents, held a meeting to develop an Individualized Education Program ("IEP") for Petitioner.

15. The parents did not express any complaints with Petitioner's IEP.

16. As of ___ Petitioner's third birthday, Petitioner was placed in a self-contained classroom at Parkade Elementary School for three half-days, nine hours per week.

17. At least up to September 1996, Petitioner's teachers and other professionals and his parents noticed progress in Petitioner.

18. On August 12, 1996, Dr. Terry described Petitioner as follows:

Petitioner is a ___ little boy, with history of extreme prematurity (birth weight less than 1000 grams) and developmental delay affecting motor, language and social/cognitive skills. Petitioner is non-verbal and has prominent pervasive behavioral characteristics. Formal psychological evaluation for Pervasive Developmental Disorder or Autism has not been done.

The doctor's report of August 12, 1996, was first identified to the District in February 1997 and when the parents realized that the District did not have the report, they presented it to the District in March 1997.

19. The testimony is in conflict regarding the release of the report. The parents testified that they verbally declared autism to the District in September 1996, and all District officials denied receiving such declaration

20. The IEP meeting was held on September 11, 1996 with appropriate individuals and the parents in attendance.

21. The September 1996 IEP was accepted as developed.

22. There was frequent and regular communication between the teachers and the parents at least up to November 1996.

23. The parents' testimony stated that they believed in November 1996 that they raised the issue of autism with Petitioner's teacher. The teacher modified an objective during the meeting with the parents in the November 1996 which was accepted by the parents.

24. In late 1996, the parents began to express concern with Petitioner's progress and they investigated other avenues to make progress. They told the District of their investigations in February 1997.

25. In response to the December 1996 Therapy Report, Mrs. ~ responded by a note on December 4, 1996, stating that she "loved hearing about how well ___ is doing at school. Your news was so exciting!"

Up until January 1997, continuing reports of progress for Petitioner were made by outside therapists and District personnel and reported by his parents.

27. The parents hired Craig Thomas on January 17, 1997, to provide services to Petitioner without notice to the District.

28. Dr. Horwitz concluded that Petitioner had PDD NOS in late 1996.

29. In January 1997 Mrs. ___ asked the classroom teacher to attend a training session for Petitioner's home program. The teacher was not able to attend the session because of a previously scheduled school program.

30. After the training session, Petitioner's home program began on January 17, 1997.

31. During the training, Thomas conducted his observations of Petitioner while conducting the training and found Petitioner with little or no skills which finding contradicted all other professionals who had observed Petitioner to that date, which surprised the parents.

32. On January 21, 1997, the parents unilaterally removed Petitioner from attending school on Thursdays in order for him to receive therapy at home.

33. In February 1997, the parents first requested payment for services outside of the District by letter which stated:

1. Funding for their ABA program with the Childhood Learning Center in Reading, Pennsylvania, consisting of 35 hours per week of one-on-one instruction by instructors

trained in the ABA method of teaching, a weekly one-hour staff meeting, monthly phone consultations, and full-day quarterly meetings with their consultant. The cost was expected to be \$1,200-1,400 per month.

2. Eventual placement in early childhood program with normal children. The goal was to have Petitioner attend preschool three half-days a week beginning in September 1997 or as soon thereafter as he was ready for such placement. He would need to have an ABA trained aide with him at school.

3. Some occupational therapy services.

4. Petitioner would remain in Ms. Kammerich's class for two days per week through the remainder of the 1996-97 school year.

34. At least in February 1997, the parties agree that the diagnosis of PDD had been disclosed to the District.

35. On or after February 25, 1997, Petitioner was only in school for two half days per week with the balance of his time spent at home. On March 4, 1997, an IEP meeting was convened with the proper attendees and with his parents, which meeting was continued on March 21, 1997.

36. At the March 3, 1997 meeting, the parents raised a question as to the present level of performance and thereafter gave the District their opinion in writing concerning the present level of performance which was reviewed by the District and incorporated into the present level report and then accepted by the parents at that time.

37. The testimony and exhibits support a finding that the "Present Level of Performance," as revised accurately reflected Petitioner's performance as of March 4, 1997.

38. The parents testified that they did not understand the effects of the present level of performance document.

39. The District staff held an informal gathering on March 20, 1997, to prepare for the March 21 IEP continuation meeting.
40. In addition to the appropriate attendees and parents, Dr. Donnelly, an outside consultant on autism from PROJECT ACCESS, attended the continued IEP meeting on March 21, 1997, to assist in the autism related .
41. During the March 21, 1997, IEP meeting, the draft goals and objectives were discussed and revised. The parents accepted the IEP as shown by the meeting transcripts even though they did not have the final document in their possession, except for the program placement of Petitioner which was to be used as a framework for methods to accomplish goals.
42. The goals and objectives included all those suggested by the parents and were agreed upon by the team. The parties understood that there would be some additional one-on-one training for Petitioner for some period of time in an extended attendance period, which training was described as discreet trial training as a methodology.
43. At the March 21 meeting, the ~ made a second request for funding of the home therapy.
44. There would be periods of discrete trial training throughout the day to "prime" Petitioner and help him be ready to participate in a group activity.
45. The District agreed to hire an additional adult to do the one-on-one training with Petitioner during class without specificity of time in addition to the time that other therapists' activities were continuing for Petitioner.
46. The panel has no legal authority to make a judgment as to the District's methodology. The District has the responsibility to determine methodology.
47. The parents disagreed with the judgment of the District. At the time each of Petitioner's IEP was written, the parents and the teachers worked together to develop goals and objectives which were accepted, but the parents disagreed with the placement recommendation of the District.

CONCLUSIONS OF LAW

48. The education of Petitioner, as well as the education of all children with verified disabilities, is governed by both federal and state law and regulations. This case is decided by the panel

under the law in effect at the time the case arose and not under the law as it changed after the facts of this case arose and the rights of Petitioner were fixed.

49. The education of all handicapped children who are residents of the State of Missouri is provided pursuant to Mo. Rev. Stat. § 162.670 to § 162.999.

50. The federal requirements are contained in the Individuals With Disabilities Education Act ("IDEA"). Under IDEA, all children with disabilities are entitled to a free, appropriate, public education ("FAPE") designed to meet their required needs. 20 U.S.C. § 1401(18). Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 203, 102 S. Ct. 3034, 3049, 73 L. Ed. 2d 690 (1982); Fort Zumwalt School District v. Clvnes, 119 F.3d 607, 610 (8th Cir. 1997). In Rowley, the U.S. Supreme Court found a "free appropriate public education" consists of educational instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction. Id., 458 U.S. at 188. The Court noted that the education "to which access is provided be sufficient confer some educational benefit upon the handicapped child." 458 U.S. at 200.

51. The primary vehicle for carrying out the IDEA's goals is the "individualized education program" ("IEP"). An IEP is "a written statement for each child with a disability developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities...." 20 U.S.C. §1401(20). Each IEP must contain a statement of the child's present level of performance, annual goals, short-term instructional objectives, a description of the placement and the reason for its selection, dates for the duration of the program, and objective criteria by which achievement of the objectives can be evaluated. 34 C.F.R. § 300.346.

52. When determining whether a disabled child has been provided with FAPE, the inquiry is twofold: "First, has the state complied with the procedures set forth in [IDEA]? And second, is the individualized educational program developed through [IDEA's] procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more"

53. In determining whether the foregoing requirements have been met, this Panel is "not free to choose between competing educational theories and impose that selection upon the school

system." IDEA leaves to local school officials the primary responsibility for selecting the educational methodology or methodologies. Parents have no right under IDEA to compel a school district to implement or fund a specific methodology in providing for the education of their handicapped child. It is not necessary to describe a particular methodology in an IEP.

54. The IEP is not required to maximize the educational benefit of the child, nor to provide each and every service and accommodation which could conceivably be of some educational benefit. An appropriate educational program is one which is reasonably calculated to enable the child to receive educational benefits. Rowley, 458 U.S. at 207. That is the standard to be applied in this proceeding.

55. The determination of whether an IEP is appropriate and reasonably calculated to confer educational benefit must be measured from the time it was offered to the student and not at some later date. This Panel must take into account what was, and was not, objectively reasonable at the time the IEP was drafted.

56. IDEA requires that states educate disabled and non-disabled children together "to the maximum extent appropriate" and that "special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily...." 20 U.S.C. § 1412(5).

57. Under Missouri law, the mainstreaming requirement means placement of disabled students with non-disabled students whenever possible. Mo. Rev. Stat. § 162.680

58. Parents seeking reimbursement for the unilateral placement of a child in a private school setting must make clear to the district that they want the district to "initiate" a change in placement. Evans v. District No. 17 of Douglas County, Nebraska, 841 F.2d 824 (8th Cir. 1988); Fort Zumwalt, 119 F.3d at 614. Parents may not obtain reimbursement for the time a child is placed in private school without the permission of the school district if it is ultimately determined that the proposed IEP met the requirements of IDEA

DECISION & ORDER

59. There is no requirement that the District make a determination by category except for the ECSE determination. Therefore, the District did not fail to identify Petitioner in a timely manner as a child with educational autism. The panel finds no violation.

60. The panel finds that the screening teams, the evaluation teams, and the IEP teams were appropriately constituted. Therefore, the panel finds no violation.

61. The District complied with the legal requirements for evaluation of Petitioner. Therefore the panel finds no violation.

62. No IEP meeting took place on March 20, 1997. Therefore, the panel finds no violation.

63. There is no requirement to use a specific methodology. Therefore, the panel finds no violation.

64. The evaluation was completed properly. Therefore, the panel finds no violation.

65. The District took into account the information provided by the parents. Therefore, the panel finds no violation.

66. The District issued the legally required written notice as it was required at the time. Therefore, the panel finds no violation.

67. The Panel finds that the District provided Petitioner a free, appropriate, public education.

68. The Individual Education Program proposed by the IEP on March 21, 1997, including specifically the placement, was designed to provide educational benefit to Petitioner, in the least restrictive environment. However, the IEP needs to be reformed to include the additional ten hours of one-on-one training offered by the District in addition to the one-on-one time that was already present so that the IEP properly reflects what was agreed to be delivered by the District.

69. The District is to pay for ten hours of one-on-one training for Petitioner over that which is already provided for the period from the effective date and implementation of the May 21, 1997 IEP.

70. The panel finds that the Petitioner did not prevail except to the issue described in paragraphs 68 and 69.

Entered and ordered this 15th day of July, 1998, by the following panel members:

Ivan L. Schraeder, Panel Chairperson

_See attached document

George Wilson, Panel Member

_See attached document

Rand Hodgson, Panel Member

Concurrent opinion

Even though we come to agreement on paragraph 68, I would believe that the evidence leads us to conclude 30 hours would be appropriate for the District to provide one on one in a low sensory, adult directed program. Since the district recognized the importance of this type of programming and offered 10 hours then paragraph 69 should show an additional 20 hours rather than 10. This is based on the evidence shown in the Lovaas studies.

I would disagree completely with my panel members on the findings in paragraph 67. I believe the evidence shows that the school district was advised of the diagnosis of Autism some time between Sept 1996 and Dec 1996. Also, the data that was collected to show true progress during the home program. After considering all the evidence provided I find the March 97 I.E.P. as written did not have educational benefit. Thus not providing F.A.P.E. The result of this is a finding for the Petitioner in 67 and 68.

My other concern had to do with the excluding of all evidence after the March 97 I.E.P. I believe that a due process hearing is the only recourse under P.L. 94-142 and to not allow the Petitioner the opportunity to bring evidence that may prove their case, would constitute the infringement of the due process rights. I did raise this issue many times.

Rand Hodgson, Panel Member

Petitioner,

v.

Columbia 93 School District

Respondent

Minority Opinion

The majority opinion in this case is held by Ivan Schraeder, Chair, and Rand Hodgson, Member. The minority opinion is held by George Wilson, Member.

Based upon the facts presented into evidence, the testimony rendered during the hearing, and applicable law, I must respectfully disagree with the majority opinions depressed in paragraphs 68 and 69.

First, I must express my agreement with the majority's Findings of Fact (paragraphs 1-47); the Conclusions of Law (paragraphs 48-58); and the Decision and Order (paragraphs 59-67, 70). It is also important to note my agreement with the first sentence of paragraph 68, i.e. that "The Individual Education Program proposed by the IEP on March 21, 1997, including specifically the placement, was desired to provide educational benefit to Petitioner, in the least restrictive environment."

My disagreement is limited to the second sentence of paragraph 68 which opines that the March 21, 1997, IEP should have reflected an additional ten hours of one-on-one training and with paragraph 69 which requires the District pay for the above one-on-one training which was not specified.

The bases for my dissent on these issues are as follows:

1. The services offered to implement the goals and objectives of the March 21, 1997, IEP were reasonably calculated to confer educational benefit for the Petitioner. The evidence is clear that the Petitioner benefited from the services provided by the District to implement both the 1995-96 and the 1996-97 IEPs. This evidence, together with the fact that the District's proposal for the March 21, 1997, IEP effectively doubled the prior services, demonstrates that the District's proposal was reasonably calculated to provide meaningful educational benefit for the Petitioner in the least restrictive environment.
2. In addition to the services detailed on the March 21, 1997, IEP, the District provided further assurances to the parent that an additional aide would be hired for the classroom in which the Petitioner would receive services. This assurance included an explanation that the aide would be hired for the classroom and not for ___ although more one-on-one time with either the teacher or the aide (or both) would result. This assurance that the Petitioner would receive the adult

supervision and individualization needed was misconstrued by the majority as an acknowledgment that additional one-on-one time required in order for the Petitioner to receive FAPE.

3. A review of the March 21, 1997, UP substantiates that group activities may be appropriate and in some case required (e.g.: goal 1, objective B; goal 2, objectives A and F; goal 3, objective B; goal 4, objective A). Other objectives may be better achieved using a peer partner or group activities. However, those decisions are properly left to the teacher implementing the IEP and the majority errs when it proposes to substitute its judgment in this instructional matter (see paragraph 53, Conclusions of law).

4. In accordance with paragraph 52, Conclusions of Law, the panel's inquiry should not have extended beyond its two primary findings, i.e. that the District had complied with all procedural requirements and that the March 21, 1997, IEP was reasonably calculated to enable the Petitioner to receive educational benefit.

5. Finally, the majority erred when it elected to rule on an issue which was not brought before it by the parties. The issue of documentation of one-on-one time on the March 21, 1997, IEP was not raised by either party. In fact, the evidence and testimony is clear that this issue was of no consequence on the date of the IEP meeting. Petitioners were clear in their testimony that they would have rejected the IPP regardless of such documentation.

For these reasons, I must dissent to the majority opinion expressed in paragraphs 68 and 69 above.

Respectfully submitted,

George Wilson

Hearing Officer

July 15, 1998