

HEARING DECISION

COVER SHEET

Re: v. School District of Kansas City, R-33

Student:

DOB:

Student Number:

Guardian:

Guardians' Counsel: Achtenberg & Achtenberg (By Irving Achtenberg)

4901 Main Street, Suite 218

Kansas City, Mo. 64141

School District Counsel: Blackwell, Sanders, et.aL (By David L. Rein, Jr.)

2300 Main Street, Ste. 100

Kansas City, Mo. 64108

Panel Members: Dr. Diane Golden

4731 South Cochise, Ste 114

Independence, Mo. 64055

Mr. Rand Hodgson

1309 Mitchell

Oak Grove, MO 64075

Panel Chair: Mr. Michael Cato

P.O. Box 668

Advance, Mo. 63730

Due Process Request Received: June 11, 1997.

Due Process Hearing Held: August 14, 1997.

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

IN THE MATTER OF

Petitioner,

v.

THE SCHOOL DISTRICT OF KANSAS CITY, MISSOURI,

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

I. PARTIES

1. The Student, at all times relevant to this due process proceeding, resided with his Guardians within the boundaries of the School District of Kansas City, R-33 (hereafter "School District").
2. The School district is an urban school district organized pursuant to Section 162.461RSMo.
3. The Hearing Panel Members in this due process proceeding are as follows:

Michael Cato	Hearing Chairperson
Dr. Diane Golden	Hearing Panel Member
Mr. Rand Hodgson	Hearing Panel Member

4. Counsel for Guardian is Mr. Irving Achtenberg of the law firm of Achtenberg & Achtenberg, 4901 Main Street Suite 218, Kansas City, Mo. 64141.
5. Counsel for School District is Mr. David L. Rein, Jr. of the law firm of: Blackwell Sanders, Matheny, Weary & Lombardi, 2300 Main Street, Suite 100), Kansas City, Mo. 64108.

II. ISSUES AND PURPOSE OF THE HEARING

Guardian objects to the Individual Education Program formulated by the Kansas City School District, R-33, on behalf of __ , her Grandson and ward (School District Exhibit # 9). Guardian by letter dated December 6, 1996 (Petitioners' Exhibit 18) objected to the proposed I.E.P. and requested an Independent Evaluation. Guardian alleges that the proposed 1996-1997 I.E.P. amounts to a unilateral reduction in services to the child. Guardian, in the request for due process indicated that the issues were as follows:

- A. Failure to adopt a new annual I.E.P.;
- B. Reduction of Services;
- C. Failure of I.E.P. to designate specific services;
- D. Failure to communicate with guardian;
- E. Failure to provide one-on-one paraprofessional throughout the school day;
- F. Failure to provide a trained consultant;
- G. Failure to provide an Independent Evaluation;
- H. Failure to notify guardian of proposed changes in I.E.P.;
- I. Failure to respond to telephone calls and correspondence.

Guardian indicated during the hearing following objections to the 1996- 1997 I.E.P.;

- J. Reduction of hours of assistance provided by Paraprofessional;
- K. Elimination of the use of an "Outside" autism consultant;
- L. Discontinuation of "Daily Summaries" of the child's behavior and, M.

The School Districts lack of communication with and involving guardian in decision regarding the child.

III. TIME LINE INFORMATION

This Due Process hearing was requested by Petitioner by letter dated June 9, 1996 and Received by Department of Elementary and Secondary Education on June 11, 1997. The original deadline for holding the hearing and mailing of the decision was July 28, 1997. On July 9, 1997, Counsel

for the School District requested an extension of the hearing date and the date of mailing of the decision . The request for continuance was based upon the unavailability of witnesses. On July 25, 1997, the panel chair granted the request of the school district granting an extension of the hearing date and date of mailing of the decision up to and including September 15, 1997. This Due Process proceeding was held on August 14, 1997 at the Offices of Blackwell, Sanders, et.al, 2300 Main Street, Kansas City, Missouri.

IV. FACTS

1. Student is a ___ year old child with Autism, currently enrolled in the Bryan School of the Kansas City Missouri School District. Guardian is the paternal Grandmother of the Student.
2. On April 27, 1995, an I.E.P. was formulated for Student for the 1995-1996 school year. (See: School District Exhibit 5 and Petitioners Exhibit 2). Guardian contends that a "Part II" of the 1995-1996 was also adopted for Student by the District. (See: Petitioners Exhibit 1). School Districts denies that "Part II" as seen in Petitioners Exhibit 1 was never a part of the "Formal" I.E.P.
3. The LE.P. formulated for the 1995-1996 school year (See: School District Exhibit 5 and Petitioners Exhibit 2) provided for an "Educational Assistant" for the child without specifying the duration of such assistance. The I.E.P. further provided that the "Educational Assistant" was to record objective data on certain skills tested in the Students I.E.P. uncontradicted testimony from school district employees suggest that student was provided an educational assistant for the entire school day during the 1995-1996 school year. Testimony further provided that the School district used a "Daily Report" to record information on the student which was then provided to the Guardian.
4. The I.E.P. formulated for the 1995-1996 school year (See: School District Exhibit 5 and Petitioners Exhibit 2) provided for the use of "Autism Consultants", five hours per week, to implement an appropriate LE.P. for the Student. School District entered into a "Service Agreement" with Northwest Missouri Autism Consortium to provide "Consultation and Training Services on Autism". (See School District Exhibit 16). No specifications were made as to the qualifications of the Consultant. School district did provide the required consultations.
5. Beginning with the School District summer session of 1996, the services of Northwest Missouri Autism Consortium were terminated in favor of "In House" consultants, i.e. employees of the Kansas City School District.

6. Beginning with the 1996-1997 school session, the number of hours of assistance provided by the "Educational Assistant" to student was reduced by 12 hours per week. Also beginning with the 1996- 1997 school session, the school district ceased using 'daily Reports" in favor of other, unspecified methods. The District contending that the daily reports were the source of much contention and discord with the Guardian. The I.E.P. formulated for the 1996-1997 school year (See: School District Exhibit 9) was not formulated until November 11, 1996.
7. Guardian by letter dated December 6, 1996 (Petitioners' Exhibit 18) objected to the formulated I.E.P. and requested an Independent Evaluation.
8. School District considered the requests of the Guardian on November 13, 1996 and issued a "Notice of Action Refused" (School District Exhibit 1). No evidence was presented regarding what consideration, if any, was given to Guardians' request for an Independent Evaluation. School District did however, consider the Guardian request for continued use of an outside Autism consultant and a 1: 1 Educational Assistant, but rejected both requests.
9. A Resolution conference was held on May 14, 1997, with the formal resolution conference report issued on June 5, 1997 (School District 2). School District again rejected the request of the Guardian for an Outside Autism Consultant and use of a 1: 1 Educational Assistant.
10. Guardian by letter dated June 9, 1997 requested the initiation of Due Process Procedures. This hearing ensued.
11. Guardian filed a child complaint with the Department of Elementary and Secondary Education alleging that School District was out of compliance with the Individuals with Disabilities Education Act in that School District failed to provide an educational assistant during the summer 1996 session. (See School District Exhibit 4). The Decision reached by DESE on the child complaint concluded that the School District was found to be in compliance, as the 1995-1996 I.E.P. did not require the assistance of a 1: 1 Educational Assistant.
12. Guardian filed a child complaint with the Department of Elementary and Secondary Education alleging that School District was out of compliance with the Individuals with Disabilities Education Act in that School District failed to adopt an I.E.P. for the 1996-1997 school year until November 11, 1996. The Decision reached by DESE found School District out of compliance and ordered the district to reconvene the I.E.P. team and consider what, if any, compensatory services were in order due to District failure to adopt. The School District I.E.P. team found no compensatory services were required.

13. School District contends that the full-time assistance provided by the educational assistance to Student during the 1995-1996 school year was in excess of the I.E.P. in place for that time frame. Therefore, a decrease in the amount of assistance of the educational Assistant to current level is not a "Reduction" in services. Likewise, School District contends it is providing autism consulting services with qualified school district personnel. Again contending that the current service provided is not a "reduction" in service.

V. CONCLUSIONS OF LAW

The Hearing Panel, after hearing the evidence in this matter makes the following Conclusions of Law:

1. The Student is a child with a disability, as that term is defined in the Individuals with Disabilities Education Act ("IDEA") regulations, 34 C.F.R 300.7. Student also meets the criteria in the State Plan for Part B of the Individuals with Disabilities Education Act ("State Plan") for the receipt of special education and related services.

2. Guardian made a timely application for an "Independent Evaluation" of Student. (Petitioners Exhibit 18) pursuant to 34 CFR § 300.503.

This panel rejects the School Districts contention that an Independent Evaluation is used only to diagnose a student's disability, therefore since student's disability is not in question, Student is not entitled to an Independent Evaluation. This panel notes that an Independent Evaluation may be used for a number of issues, not limited necessarily to diagnoses. Further the School district contends that without evidence that the 1996 Diagnostic summary is incorrect Guardian is not entitled to the Independent Evaluation. This panel finds this argument unpersuasive.

3. School district did not attempt to prove what consideration, if any, was given to Guardians request for an Independent Evaluation. School District did not grant, nor deny Guardians request for an Independent Evaluation. School District did not initiate Due Process proceedings to show the appropriateness of their evaluation. School District made no attempt to bring forward the local policy on Independent Evaluations, leaving this panel with questions as to the proper application of the local policy, if any. School District made tattle, if any attempt to show its compliance with the Federal Regulations concerning Independent Evaluations.

4. Guardian correctly contends that the services required by an I.E.P. may not be reduced without revising the I.E.P. and justifying said changes (Appendix, Note 43 and 51, § 300.504). As set forth below, this panel does not view the changes in services as reductions.

5. Guardians timely application for an "Independent Evaluation" and Request for Administrative Review, of Student. (Petitioners Exhibit 18) pursuant to 34 CFR § 300.503, invokes the "Stay-Put" provisions (34 CFR § 300.513) which would preclude change in the Student's I.E.P. educational placement until the completion of the Independent Evaluation. Thus the I.E.P. which the school must implement for the Student is the 1995-1996 I.E.P. (See: School District Exhibit 5).

This panel then turns its attention to the question of the specifics of the requirements of the 1995-1996 I.E.P. (See: School District Exhibit 5 and Petitioners Exhibit 2) . This panel concludes that regardless of the incision of "Part If" of the 1995-1996 I.E.P., the school district must provide the following disputed services and supports to Student;

I. An "Educational Assistant" to be provided to the Student as per the 1995-1996 I.E.P. (School District Exhibit 5). Due to a lack of persuasive testimony on this issue, this panel declines to rule concerning necessary duration and coverage of the educational assistant, however, this panel does note that despite the School District contention that 1: 1 coverage is not *Required* by this I.E.P. such coverage was provided during the 1995-1996 school year;

II. 5 hours per week of Autism "Consultation" as per the 1995-1995 I.E.P.; This panel agrees with the School District's position that nothing in the I.E.P. specifies the qualifications of the consultants nor does it mandate that the consultant be outside of the School District. This panel concludes that the consultation may be with *Qualified* school personnel Several school district employees testified as their experience, training and qualifications to deal with Autism, no documentation was presented showing that such consultations had, in fact, taken place. While consultations may be had with school personnel consultation must be had, and documented; behavior;

III. Summaries of the child's behavior and progress are to be kept and made available to the Guardian, periodically. This panel finds no precedents in law for a requirement that daily summaries be kept, however, empirical evidence must be gathered and stored. The school district is required to keep records of the students behavior and progress and further to provide summaries to the Guardian periodically. No credible testimony or evidence was adduced which addressed the issue of the usefulness of the daily summaries in implementing the students I.E.P. Likewise the School District failed to specify the system which it now uses in the stead of the Daily Summary;

IV. School District must communicate with the Guardian as to the students progress and behavior;

V. All undisputed services and supports listed in the Students 1996-1997 I.E.P may be implemented, however as to disputed services and supports School District must look to and implement the students 1995- 1996 I.E.P.

6. This panel concludes that while School District has failed to meet all required procedural safeguards, no compensatory services are warranted, as no effort was made, by either party, to show what harm had been rendered to the student to rectify such harm. or further what services might be necessary or helpful to rectify such harm.

7. The federal district courts have exclusive jurisdiction over action for attorney fees under the IDEA *Curtis K V. Sioux City Community School district, et. Al*, 895 F.Supp. 1197, 1211-12 (N.D. Iowa 1995). Accordingly, this hearing panel has no authority to award reasonable attorney fees, even if they were appropriate. Student and his guardian are not "Prevailing Parties" pursuant to 42 USC § 1988 or any other state or federal statute allowing attorney fees.

8. While Guardian originally complained of the failure of the I.E.P. to designate specific services, no evidence or testimony was presented during the hearing on this issue. Therefore, the panel finds no reason to rule on lack of specificity.

VI. DECISION AND ORDER

The hearing Panel makes the following Decision and Order in this case;

1. Guardian Issue "A"; As to the issue of failure to adopt a new annual I.E.P; this panel finds that the district was NOT in compliance with the IDEA and applicable state and federal regulations for its failure to adopt an I.E.P. until November 1996. However, as stated above no compensatory services are awarded.

2. Guardian & Issues "B" "D" "E" "F" and "H" "T" "J" "K" "L" and " M": The panel finds that the changes in services are not a "Reduction" in services. Further as to Guardian Issue "G" the Panel finds that the School District has failed to respond to the Guardians request for an Independent Educational Evaluation. The School District is hereby Ordered to provide the requested Independent educational Evaluation requested by the Guardian at the expense of the School District. The School District must implement the 1995-1996 I.E.P. formulated for the Student as

set forth above . Upon completion of the independent evaluation, it is contemplated that each parties will proceed under applicable statutes and regulation.

3. Guardian Issue "C": no evidence was introduced on this issue and the panel finds that the 1995-1996 I.E.P. does designate specific services.

4. As to the issue of Attorney fees, as set forth above, the hearing panel has no jurisdiction over whether damages or attorney fees should be granted in this case.

The Entire hearing panel joins in this decision without dissent.

VII. APPEALPROCEDURES

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

FOR THE HEARING PANEL;

Mr. Michael Cato, Chairperson

Dr. Diane Golden, Panel Member

Mr. Rand Hodgson, Panel Member

CERTIFICATE OF SERVICE

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

Irving Achtenberg

Achtenberg & Achtenberg

Attorneys at Law

4901 Main Street

Suite 218

Kansas City, Mo. 64 112

ATTORNEY FOR GUARDIAN

Mr. David L. Rein, Jr.

Blackwell, Sanders, Matheny, Weary & Lombardi

Attorneys at Law

2300 Main Street

Suite 1100

Kansas City, Mo. 64141

ATTORNEY FOR SCHOOL DISTRICT

by depositing same in the United States Post Office in Advance, Missouri, with sufficient postage,
on this 13th day of September, 1997.