

BEFORE THE THREE-MEMBER DUE PROCESS HEARING PANEL

EMPOWERED PURSUANT TO RSMo. 162.961

_____, et al., Petitioners, and Neosho R-V School District, Respondent.

PERSONALLY IDENTIFIABLE INFORMATION

The parties to this hearing are:

Student:

Date of Birth:

Grade Level: 5

School District: Neosho R-V School District

c/o Dr. Gary W. Quinn, Superintendent of Schools

511 Neosho Blvd.

Neosho, Missouri 64850

Parents:

School District's Representative: Teri B. Goldman, Esq.

Blackwell Sanders Peper Martin

720 Olive Street, 24th Floor

St. Louis, Missouri 63101-2396

Parent's Representative: Ernest G. Trakas, Esq.

Deputy Managing Attorney

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200 S. Hanley Road, Suite 1030

Clayton, Missouri 63105

ISSUE AND PURPOSE OF THE HEARING

Whether or not the annual goals and short term objectives contained in the IEPs of August 14, 1997 and October 27, 1997 satisfy Respondent's obligation to devise and implement adaptations, strategies and modifications including positive behavioral interventions and support?

INFORMATION TIME-LINE

The request for hearing was received by the Department of Education on or about October 2, 1998. A joint motion was received requesting an extension of the statutory time-lines and an order was entered, accordingly, on October 29, 1998 that the hearing be continued for trial to January 4, 1999 and that a final decision be submitted to the parties on or before 45 days after the conclusion of the hearing. On November 9, 1998 an order was entered pursuant to "Second Joint Motion Requesting an Extension of Statutory Time-Lines," continuing the hearing to the week of February 22, 1999 with a final decision to be rendered 45 days thereafter. Subsequently another joint motion was received, requesting an extension of the statutory time-lines in order to hear the case the week of May 3, 1999 with a final decision to be rendered 45 days thereafter. An order was so entered on January 13, 1999.

The due process hearing was held on May 3, 4, and 5, 1999 at the Neosho Middle School, 1400 Hale McGinty Drive, Neosho, Missouri before the Three-Member Due Process Hearing Panel, including Marilyn Bohnsack-Member, Mary Matthews-Member, and George J. Bude, Chairman. At the conclusion of the hearing, the Chairman requested that the parties submit proposed findings of fact and conclusions of law on or before May 28, 1999 and suggested that the opinion be submitted to the parties no later than June 30. Both parties agreed.

JURISDICTION AND ISSUES

1.The Individuals with Disabilities Act ("IDEA") codified at 20 U.S.C. 1400 et seq. entitles the parents of a child with a disability to "an impartial due process hearing" upon request, with respect to "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a Free Appropriate Public Education of such child." 20 U.S.C. 1415 (b)(1)(E)(2). In Missouri, the hearing authorized by 162.961, RSMo., is intended to be the impartial due process hearing mandated by the IDEA.

In Petitioner's Second Amended Statement of Issues, dated April 27, 1999, the final issues for determination were as follows:

1.Respondent failed to provide Petitioner with a free appropriate public education in that it failed to develop and implement an appropriate Behavior Management Plan for the 1997-98 school year, in violation of 20 U.S.C. 1400 et seq.

2. Respondent has failed to provide Petitioner with a free, appropriate public education, in that Respondent failed to develop appropriate Individualized Education Plan(s) for Petitioner, in violation of 20 U.S.C. 1400 et seq.

3. Respondent has failed to provide Petitioner with a free appropriate public education in that it failed to provide an appropriate educational placement for Petitioner for the 1997-98 school year, in violation of 20 U.S.C. 1400 et seq.

However, Petitioner in his opening statement narrowed the issues to one and confirmed same in his "Proposed Findings of Fact, Conclusions of Law and Decision" by stating:

"The issues have now been refined to whether or not the annual goals and short term objectives contained in the IEPs of August 14, 1997 and October 27, 1997, satisfy Respondent's obligation to devise and implement adaptations, strategies and modifications including positive behavioral interventions and supports."

Therefore, the Panel's opinion will address that issue.

FINDINGS OF FACT

2. The Petitioner is a _____ year old male student who currently resides in the Neosho R-V School District in Neosho, Missouri and so resided during the 1997-98 school year.

3. The Respondent is a school district operating within the guidelines of the Missouri Department of Elementary and Secondary Education ("DESE"). The district receives federal financial assistance through DESE.

4. Petitioner was diagnosed as Learning Disabled by the Respondent prior to the start of the 1997-98 school year. Both prior to and subsequent to the Respondent's determination and diagnosis of Petitioner as Learning Disabled, Petitioner's parents obtained diagnoses of Autism-Asperger's Syndrome. Later in the 1997-98 school year Respondent evaluated Petitioner as having a behavior disorder.

5. Prior to June 16, 1997, Petitioner's parents initiated a due process proceeding in his behalf pursuant to the IDEA against the Respondent. On or about June 16, 1997, Petitioner and Respondent settled that proceeding. As part of that settlement it was agreed that Petitioner's educational placement for the 1997-98 school year would be changed to a self-contained setting and that the Respondent would prepare an IEP to reflect that change in placement. In addition,

the settlement agreement provided for a self-contained placement with mainstreaming in music, that the IEP team would convene every two weeks to determine if additional mainstreaming time should be added, provided for a full-time, one-on-one paraprofessional for Petitioner, as well as other provisions, all of which the Panel finds were carried out by the Respondent.

6. In addition, the Respondent agreed in the settlement agreement that:

"The (IEP) plan will include a list of appropriate and inappropriate behaviors...interventions and strategies to be used in dealing with inappropriate behaviors."

7. Petitioner's challenging behaviors numbered as follows:

<u>Month</u>	<u>Number of Challenging Behaviors</u>
August	3
September	10
October	21
November	107
January	84
February	110
March	394

Although Petitioner's challenging behaviors were a serious issue, beginning early in the 1997-98 school year, and were the topic of discussion at virtually every IEP meeting which was held approximately every two weeks during that school year, the IEP team was never able to come to grips with the problem. Petitioner's challenging behaviors steadily escalated throughout the year.

8. Although Petitioner's IEP plan dated August 14, 1998 and the one dated October 22, 1997 called for a behavior plan, none was attempted by the IEP team until April, 1998. A plan of sorts had been developed during the prior school year for the Petitioner by an outside agency, Judevine, whose representatives attended IEP meetings in support of Petitioner's parents and the Petitioner. That plan was used by Petitioner's special education teacher, Twila Star Sweet, as a behavior checklist, but this document was never adopted by the team, nor was it analyzed or deemed to be appropriate as a behavior management plan by the team.

9. Petitioner's IEPs contained certain short-term goals and objectives relative to behavior, but these "strategies" were clearly insufficient in order to prevent or substantially reduce Petitioner's challenging behaviors. The present level statements failed to give a definitive description of behaviors that needed to be extinguished and thus provide a basis for development of effective goals and objectives.

10. Petitioner produced an expert who testified that Petitioner's challenging behaviors required the adoption of a behavior management plan which included a functional behavior assessment which identified antecedent events, challenging behaviors and the development of consequences and reinforcements; a functional behavioral analysis; and a behavior management plan. The Panel finds that in this particular instance, such a behavior management plan should have been adopted in order that Petitioner's challenging behaviors could be appropriately reduced so that they would not substantially interfere with his ability to learn or to interfere substantially with other students' ability to learn.

11. Respondent made no attempt to identify antecedent events or devise appropriate consequences and reinforcements until March of 1998 and made no attempt to devise a formal behavior management plan for Petitioner until April of 1998. This plan was insufficiently tailored to meet Petitioner's needs.

12. Although Respondent made some effort to include Petitioner in non-academic activities with his non-disabled peers, his challenging behaviors precluded his being mainstreamed; that is, integrated into academic settings with his peers.

13. When Petitioner began the 1997-98 school year in August of 1997, he attended Ms. Sweet's 5th grade special education classroom. During the first one to two weeks of school, Petitioner was the only student in Ms. Sweet's class where he was accompanied by his paraprofessional, Mr. Larry Shadday. Mr. Shadday continued to accompany Petitioner in all of his classes throughout the school year and indeed did an excellent job of attempting to cope with Petitioner's challenging behaviors, but Mr. Shadday did not have the professional training or experience to successfully prevent or substantially reduce those behaviors.

14. At the beginning of the school year, Petitioner generally was performing at the 3rd grade level. However, the only documented evidence of Petitioner's academic achievement indicates that on September 24, 1997, his mid-quarter grades were as follows: he was spelling at the 5th grade level, science at the 3rd grade level, math at the 4th grade level, reading at the 3rd grade level, social studies at the 4th grade level, English at the 3rd grade level, and writing at the 3rd

grade level. This report card contained the following note: "A lot of help from Mr. Larry" indicating that Larry Shadday was assisting Petitioner in order for him to work at the levels indicated. There are report cards of some variety dated November 4, 1994 (sic) and November 18, 1997 (see Respondent's Exhibit R-252) which indicate that Petitioner received 100% in spelling, 90% in math, 98% in reading, 24% in social studies, 57% in science, 88% in English, and 71% in writing (November 4, 1994) (sic) and 100% in spelling, 79% in math, 81% in reading, 51% in social studies, 82% in science, 73% in English, and 88% in writing (November 18, 1997). Neither of these report cards indicate whether they were for a period of time or what level. Therefore, they are of little assistance to the Panel. Respondent's Exhibits R-337 and R-339 indicate grades as of April 22, 1998 but they appear to be grades for a particular lesson rather than work over a particular period of time. Moreover, Petitioner's special education teacher, Ms. Sweet, testified that whenever the Petitioner was moved up from the 3rd grade level, he experienced great frustration in attempting to do the academic work and his behaviors increased dramatically. As a consequence, each time he was moved up, his teacher was required to subsequently move him back to 3rd grade level. There is no clear evidence from which the Panel can determine if or to what extent Petitioner progressed in his academic subjects. Various witnesses for the Respondent testified that in their opinion Petitioner made academic progress or received an educational benefit; however, in combination with the evidence that Petitioner became frustrated when he was advanced in his studies and had to be returned to the 3rd grade level, these expressions and generalizations of opinion are meaningless to the Panel.

15. Petitioner's mother insisted on Petitioner attending the IEP meetings. The Panel finds that his inappropriate behaviors increased at or near and after the IEP meetings. In the opinion of the Panel, Petitioner should be excused from attendance at IEP meetings.

16. Petitioner attended class in a combination classroom for self-contained and resource room students. During the school day, resource students were coming in and out of the class. This movement of students in and out of the classroom, together with the attendant noise and other disturbance had an adverse impact on the Petitioner's behaviors. Petitioner should be placed in a self-contained room (not a combination room) where there are fewer distractions and less noise—at least until it can be determined that Petitioner can cope with greater inclusion.

17. The director of Special Education Services made little or no attempt to put together a behavior management plan or other effective behavior intervention strategies prior to April, 1998. He showed little leadership in addressing the behavior problems of the Petitioner. The Panel finds that the school district had no one on staff who was fully competent to devise a behavior management plan or other appropriate intervention strategies in order to significantly

reduce Petitioner's behaviors. However, this is not to say that the Panel finds that certain members of the Respondent's staff did not make an honest effort to assist the Petitioner. Certainly, Petitioner's aide, Mr. Shadday, and Petitioner's special education teacher, Ms. Sweet, worked hard to help the Petitioner. They simply did not have the expertise to reduce his challenging behaviors substantially so that he could progress academically.

18. The Panel finds that there is no animosity towards Petitioner among those members of the Respondent's staff who will be employed during the next school year. Indeed, the Panel finds that from the principal down through the teaching staff, and the paraprofessionals who would be working with the Petitioner next year, that the past history of Petitioner's experience in the school district would have no adverse impact on the desire of the staff to assist the Petitioner academically, socially, and in his behavior. The Panel hopes that Petitioner's parents will show proper patience with Respondent in order to give Respondent time to devise and implement an appropriate behavior management plan. It will take time to reduce Petitioner's behaviors so that he can be successfully mainstreamed later. No one can predict how long it will take. Experience with an appropriate plan will be the proper determinant.

CONCLUSIONS OF LAW AND DECISION

19. The Individuals with Disabilities Education Act ("IDEA") guarantees all public school children with disabilities a free appropriate public education ("FAPE") designed to meet their unique needs. 20 U.S.C. 1412(a)(1). However, the IDEA does not prescribe any substantive standard regarding the level of education to be accorded to disabled children, *Board of Educ v. Rowley*, 458 U. 176, 189, 195 (1982), *Fort Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 611-12 (8th Cir. 1997). Rather, a local educational agency ("LEA") fulfills the requirement of providing a free appropriate public education "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley*, 458 U.S. at 203; *Clynes*, 119 F.3d at 612. In determining the adequacy of the program provided by the public school, "Congress did not intend that school system could discharge its duty under the [IDEA] by providing a program that produces some minimal academic achievement, no matter how trivial." *Carter v. Florence County School District Four*, 950 F.2d 156, 160 (4th Cir. 1991), *aff'd*. _____ U.S. _____, 114 S.Ct. 361, 126, L.Ed. 2d 284 (1993); compare *Doe by Doe v. Tullahoma City Schools*, 9 F.3d 455, 459 (6th Cir. 1993) (educational benefits must be more than D minus to be "appropriate"); *Oberti v. Board of Education*, 995 F.2d 1204, 1213 (3rd Cir. 1993); *Hall ex rel. Hall v. Vance County Board of Education*, 774 F.2d 629, 636 (4th Cir. 1985).

Thus, in the case of a student with a behavior disorder, the IDEA and the Missouri State Plan require that Respondent provide strategies, adaptations and interventions calculated to allow that student to receive an educational benefit to successfully provide a FAPE to that student. In addition, the settlement agreement between Petitioner and Respondents (Respondent's Exhibit R-218) required an IEP which included a list of appropriate and inappropriate behaviors and interventions and strategies to be used in dealing with inappropriate behaviors. By implication those interventions and strategies must be effective. Here, clearly they were not. Respondent not only failed to satisfy the requirements of IDEA with respect to the Petitioner, it failed to satisfy the requirements of the settlement agreement. That is, the Respondent failed to devise and put in place effective behavior management strategies calculated to meet the Petitioner's needs so that he could gain more than a D minus educational benefit. The Panel concludes that there is no credible evidence to establish that the Petitioner gained an educational benefit sufficient to satisfy *Rowley*, *Carter v. Board of education*, or *Hall ex rel. Hall v. Vance County Board of Education*, *supra*. Consequently, Respondent failed to provide a FAPE for the Petitioner during the 1997-98 school year.

20. The IDEA also state Congress's preference for "mainstreaming," otherwise known as educating the child in the least restrictive environment ("LRE"). 20 U.S.C. 1412(a)(5). However, federal law requires that states educate disabled and nondisabled children together only "to the maximum extent appropriate." *Id. See also Oberti v. Bd. Of Educ. Of Clementon Sch. Dist.*, 995 F.2d 1204, 1207 (3rd Cir. 1993). The LRE determination is made in accordance with the child's abilities and needs. See OSEP Mem. 95-9, 21 IDELR 1152 (1994). The Supreme Court has recognized that "[d]espite this preference for mainstreaming handicapped children...congress recognized that regular classrooms simply would not be a suitable setting for the education of many handicapped children." *Rowley*, 458 U.S. at 181 n.4. Accordingly, the mainstreaming preference must be "balanced with the primary objective of providing handicapped children with an appropriate education. Thus, a more restrictive environment may be the least restrictive environment for a particular child. *Carter v. Florence County Sch. Dist. Four*, 950 F.2d 156, 160 (4th Cir. 1991) ("where necessary for educational reasons, mainstreaming assumes a subordinate role in formulating an educational program"). See also 34 C.F.R. 300.550 comment ("If the child's behavior in the regular classroom, even with the provision of appropriate behavioral supports, strategies or interventions, would significantly impair the learning of others, that placement would not meet his or her needs and would not be appropriate for that child.")

It is clear that the parties agreed in the settlement agreement that the Petitioner should be placed in a self-contained classroom at the beginning of the 1997-98 school year. His behaviors

during the 1997-98 school year, which increased during the month of March to an astronomical number (394), established that he could not be mainstreamed. The Petitioner did not present any evidence with respect to his behaviors during the 1998-99 school year when he was placed in a private school that would indicate that he should be placed otherwise than in a self-contained setting. Therefore, Petitioner should not be mainstreamed until there is some evidence during the next school year that he can successfully participate in a regular classroom.

DECISION

21. It is the decision of this Panel that the Respondent immediately seek the expertise of a consultant or some qualified expert in order to devise a behavior management plan for the Petitioner which includes the following elements:

An ongoing functional behavior analysis which identifies causative factors and objectionable behaviors

A behavior management plan that provides replacement behaviors and/or strategies for extinction of the cited objectionable behaviors calculated to substantially reduce the Petitioner's adverse behaviors which interfere with his and other students' ability to receive educational benefits. It is the further order of this Panel that Petitioner's teacher and other personnel of the Respondent who are assigned to implement the plan be provided ample staff development including strategies for working with students with Asperger's Syndrome and high functioning autistic students.

APPEAL PROCEDURE

PLEASE TAKE NOTICE THAT THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION CONSTITUTE THE FINAL DECISION OF THE DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION IN THIS MATTER.

PLEASE TAKE FURTHER NOTICE that you have a right to request review of this decision pursuant to the Missouri Administrative Procedure Act, Section 536.010 et seq. RSMo., specifically, Section 536.110 RSMo. which provides in pertinent part as follows:

"1. Proceedings for review may be instituted by filing a petition in the Circuit Court of the county of proper venue within 30 days after the mailing or delivery of the notice of the agency's final decision...

3.The venue of such cases shall, at the option of the plaintiff, be in the Circuit Court of Cole County or in the county of the plaintiff or of one of the plaintiff's residence..."

PLEASE TAKE FURTHER NOTICE that, alternatively, your appeal may be taken to the United States District Court for the Western District of Missouri in lieu of appeal to the state courts. 20 U.S.C. 1415.

SO ORDERED this 22nd day of June, 1999.

George J. Bude, Chairperson

Mary Matthews, Member

Marilyn Bohnsack, Member

Copies of the foregoing mailed to:

Mr. Ernest G. Trakes

Ms. Teri B. Goldman

Ms. Heidi Atkins Leiberman