

IN THE MATTER OF)
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A.L.)
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V.)
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EVANSTON-SKOKIE)
)
SCHOOL DISTRICT #65)

DUE PROCESS HEARING

CASE #002352

PROCEDURAL INFORMATION

On November 27, 2001 at 9:15 AM an impartial due process hearing was convened by Judge Julia Quinn Dempsey, the Hearing Officer, on behalf of Alex Lavnick, the Student, at the District Administration Center, 1314 Ridge Road, Evanston, Illinois. The hearing continued on November 28, 30 and December 14 and 18, 2001. At its conclusion the Attorney's requested a transcript be prepared prior to the writing and submission of simultaneous briefs. It was so ordered. Post Hearing Briefs were submitted by both Parties on January 15, 2002 and received by the Hearing Officer on January 17, 2002. The transcript of the final days of the hearing was received by the Hearing Officer on January 23, 2002. The Hearing Record was officially closed at that time. The Hearing Officer has jurisdiction to hear and decide this matter under 105 ILCS 5/14 - 8.02a et seq., 23 Illinois Administrative Code 226.600 et seq., the Individuals with Disabilities Act, as amended 20 USC 1400 (IDEA), and 34 CFR 300.507 et seq. The parties were informed of their rights under 105 ILCS 5/14 - 8.02 et seq., 23 Illinois Administrative Code 226.636 and 34 CFR 300.509.

The Parent requested this hearing on June 28, 2001 by letter to the School District from the Attorney Brooke R. Whiffed. On July 3, 2001 the District wrote to ISBE requesting a due process hearing with a form dated July 2, 2001. This was date stamped in at ISBE on July 9, 2001 by the Division of Program Compliance. On July 10, 2001 ISBE mailed the notice of appointment to the Hearing Officer and it was received on July 18, 2001. The Hearing Officer took immediate steps to contact the parties. After some back and forth telephone and fax communication, the Attorneys for the Mother, the School District Attorney and the Hearing Officer agreed to a Pre-Hearing Telephone Conference date and time. On September 12, 2001 the Hearing Officer notified Parent's Attorney Brooke Whitted, and Thomas Abram, Attorney for the School District, that the Pre-Hearing Telephone Conference was scheduled for September 12, 2001 at 11:00 AM. Both parties agreed to this date. (See H.O. Grpx #1p9-11)

The Pre-Hearing Telephone Conference was held on the scheduled date. Each party provided some background. Both parties provided preliminary Witness Lists and Document Lists. The Hearing was scheduled to begin on Monday, October 2, 2001, for the convenience of the Parties, at 9:00 AM at the District Administration Center. It was agreed that the Hearing would continue on October 30 and 31, 2001 and then reconvene if necessary to finish.

At the Prehearing Conference an agreement was reached whereby the Parties would jointly exchange their documents by October 5, 2001. By October 11, 2001 the Parties were to notify the Hearing Officer of any documents to which they objected. By October 16, 2001 both Parties were to file Responses to the Objections and the Hearing Officer agreed to rule on these matters by October 19, 2001. The Prehearing report was issued on October 15, 2001. (H.O. Grpx#1p12, 13) Various faxed and Federal Expressed documents, as detailed below, were then forthcoming.

1. On October 5, 2001 by Federal Express, the District filed a Request to Produce Documents, an Exhibit List and copies of Proposed Exhibits consisting of 67 pages, including the prior Hearing Officer's decision.
2. On October 11, 2001 at Noon, by fax, the Parent's filed a Conditional Motion to Exclude Documents. On the same day, later in the afternoon the Parents by messenger delivered to the Hearing Officer a copy of the Parent's proposed Exhibits in the form of a 332 page black notebook titled "Lavnick Witness, Briefing and Exhibit Book".
3. By fax on October 11, 2001 at 4pm the District filed a Motion in Limine with exhibits consisting of 41 pages, objecting to various Parent's Exhibits.
4. By fax on October 16, 2001 at 5pm the Parent filed a 42 page, including exhibits, Response to District's Motion in Limine.
5. By fax, on October 16, 2001 at 5:30 PM, the Parent filed Objections to the lack of an issue in the Pre-hearing *Conference Report* and objecting to the procedural exclusion of witness unless they are testifying.
6. On October 17, 2001, by fax at 4:30 PM, the District filed a response to the Parent's Objections to the Pre-hearing Report.
7. On October 18, 2001, by fax at 3:45 PM, the Parent filed an expanded objection to the Prehearing Report.
8. On October 18, 2001, by fax at 4:30 PM, the District responded to the expanded objections.
9. On October 19, 2001 at 4 PM, by fax, the Parent filed a Motion to Require the District to Specify and a Request to Produce.

On October 21, 2001 the Hearing Officer ruled on the various Objections, Motions and Conditional Motions and Requests to Produce. The ruling is set forth in H.O. Grpx#1p14 - 16. The Parents Attorney's then filed an Emergency Motion with the Hearing Officer on October 22, 2001 at 4:45 PM by fax. The District *response was* filed by fax on October 23, 2001 at 12:00PM and a Request for Postponement for health related reasons was received from the attorney for the District by fax on October 24, 2001 at 10:00AM. Communication was had on October 25, 26, and 29, 2001 with Counsel for the Parent, who all *agreed to* a postponement,

until November 27, 28 and 30, 2001. This was cleared with the District's counsel and therefor the Hearing was continued to November 27, 28 and 30, 2001 at the same time and place as set out in the PreHearing Conference Report.

Many of the other issues raised were made moot by the actions of the Parties. The Hearing Officer Ruled on October 30, 2001 and the Hearing was reset to the end of November. (H.O. Grpxp.17, 18)

ISSUES

1. Whether placement at Cove School for the 2001-2002 school year is required to provide the Student with an appropriate education?
2. Whether placement at the Cove program is the least restrictive environment for the Student?
3. Whether the School District offered an appropriate program and IEP for the Student for the 2001 -2002 school year?
4. Whether the School District should reimburse the Parent for tuition at Cove School beginning with June 28, 2001, as well as reimbursement for the services of private evaluators used by the Parent?

BACKGROUND

The Student is a 13-year-old seventh grader in attendance at Cove School; a private Special Education facility on the ISBE approved list. He has been in attendance there since August 1999 at the age of 10 when he was entering fifth grade. His Parent placed him there. Prior to that time he attended Dawes School in Evanston from Kindergarten through fourth grade.

The Student has a history of "significant and severe learning disabilities as well as a mild left side hemiparesis, a result of right hemispheric scarring in the brain. Gross motor development has improved significantly in recent years but continues to be a difficulty. Fine motor development is significantly delayed; many activities are slow and laborious. He also has Attention Deficit Disorder, takes Adderall (5 mg b.i.d.), minor hearing loss and wears glasses. His emotional maturity and peer. relationships have improved but remain areas of concern (M.D. Summary 6-28-01 Px229, 230) (Chronology Px4 - 16) (Erenberg Report Px18-19). The Chronology in the Parents Exhibit, Pages 6 - 16, sets forth a basic history of the Student's problems from birth and the evaluations, testing and interventions that have occurred, many if not most, initiated by his mother. He has had much private therapy and tutoring arranged by her.

In June of 1999, just prior to the Student's placement at Cove School by the Mother in August 1999, she requested a due process hearing which was subsequently conducted and a decision reached on February 13, 2000 that found in favor of the District. The Mother did not return the

Student to the District but maintained him at Cove School for his fifth and sixth grade years. On May 23, 2000 the Mother was notified of a conference scheduled for June 4, 2001 to review the Students educational status, develop an IEP and review an independent evaluation from July August 2000 done by Dr. Shana Erenberg, a Learning Disabilities Specialist, employed by the Mother in the Summer proceeding the Students sixth grade year. (Dxp0015) (Pxpl5). The Conference was held and a report issued (Dx16-23). Those present included a regular education teacher of seventh grade, Tom Sims (Dxp16). The meeting was adjourned to June 28, 2001 for completion of testing and evaluations. (Dxp22, 23). Although the meeting notice (Dxp24) called for a General Education representative to attend, none did. The meeting reconvened and an IEP was developed which provided two 45 minutes per day periods of LD resource, 90 minutes per week of Speech/Language services, 45 minutes per week of Social Work service an individual teacher assistant in general education classes and access to elevator if he requested it. Review at four to six weeks into the school year of the goals and objectives was provided to address supplemental aids and supports for personnel and possible additional assessments that might be needed, including adaptive Physical Education, Assistive Technology and Occupational Therapy. (Dxp35, 36) The Student would be placed into the regular programs for most of the school day. This is apparently four periods in the morning, lunch, then two periods in the afternoon. The Student would have two periods of the day in Special Education, the rest in the seventh grade general education program. The Mother, by letter from her attorney requested a due process hearing on the same afternoon, apparently after the IEP meeting concluded.

PARENT'S POSITION

The Parent' position is set forth initially in the letter from the Mother's attorney, Brooke Whitted to Dr. Hardy Ray Murphy, the Superintendent for the District, dated June 28, 2001 (H.O.x 3,4). In that letter the Mother expressed her dissatisfaction with the Student's progress in his abilities using the services provided by the District since he entered. She alleges the Student did not receive appropriate services and that he was socially awkward and easily targeted for harassment by other children. She testified he was teased, was very anxious about school, cried a lot, and spent at least three hours every night on homework because he wanted to keep up with the class.

She testified that he has done well and been successful at Cove School, that she does not believe he would transition to the District with any success and that he could not function in the Districts regular education classes. This view is buttressed by the testimony of her expert witness and the Student's outside psychologist. She asks for tuition payment for Cove School for his seventh grade year and reimbursement for the private evaluator's services.

DISTRICT POSITION

The District position is that it has proposed an appropriate program for the Student that integrates him most fully into the "Least Restrictive Environment" (LRE) of the regular seventh grade education program.' They believe the Student can meaningfully participate in regular education classrooms for much of the seventh grade instruction with appropriate aids, accommodations and services. They believe the Student is similar to other students in terms of performance level, auditory processing difficulties, distractibility and social issues. According

to their witness Alan Studnitzer those kinds of students are participating successfully in his program. They allege that the District has a broad continuum of program options from which to choose to meet the Students needs in the event that the recommended program provided to him proved to be inadequate. They allege that the Parents expert witness, Dr. Shana Erenberg was too partisan in her testimony to give it much weight. They request that only her objective test data be considered. They also maintain that the Student should only be placed in a private facility if the District has no Special Education program to adequately or "approximately" (stet) meet his needs. (D Brief p.21)

CONCLUSIONS OF LAW AND OPINION

As regards the record, the Hearing Officer has read all of the material presented at the hearing and before, as attachments to pre-hearing motions etc. This also includes the material Dr. Shana Erenberg used to assist her testimony regarding her observations at King Lab School on two days in the fall of 2001. This consists of an eleven page document and a two page document, both of which are consistent with and supplement her testimony on December 14 and 18, 2001 set forth in the last two volumes of the transcript. [Dr. Erenberg's notes are contained in the Record as Dr. Erenberg Notes I: King Lab All Day Visit p1-11; Dr. Erenberg Notes II: Simms Class Visit p 1&2; Dr. Erenberg Notes III Cove School Visit p 1-3] All of the protocols and work and test material submitted was considered, but in reality had little impact on the decision. The Student did learn when he was in the District for Kindergarten through fourth grade. He did learn in fifth and sixth grades at Cove School. The vast array of tests used, the percentiles, grade and age equivalents, stanines, standard deviations, raw scores etc. were of little assistance in making a decision. The rate of his education is not ascertainable objectively from the wide variety of tests, raw scores, stanines etc. presented at the hearing. Both experts had different interpretations of the data, and very little comparison could be done although Dr. Utech for the District and Dr. Erenberg for the Parent both tried to do their best to compare apples and oranges. The District acknowledges the irrelevance of this material in the Post Hearing Brief at page 3 stating that "the relative rates of progress do not establish that the District's proposed placement was not appropriate" [citing O'Toole 144F3d692 (10th Cir.1998)]. The District then goes on to demonstrate the uselessness of the test data for most purposes by setting out a table on page four of the District Brief supposedly showing normal range performance in June 2001. Then on page eight of the District Brief, and in the transcript testimony by Patrice Peyton, stating that he was reading at a 4.3 grade level and would fit into her sixth and seventh grade reading class for students at the 2nd to 4th grade levels. The Hearing Officer is including all of this material as part of the hearing record and taking Judicial Notice of any of it that was not formally marked and moved into evidence, pursuant to The Administrative Hearing Act, 5ILCS100/10-35(a)(3).

In every dispute regarding a handicapped child and a school district the analysis necessary to reach a decision must begin with the bedrock teaching of Rowley (Board of Education of the Hendrick Hudson Central School District, Westchester County et al. v. Rowley by her Parents,

Rowley et ux. 458 U.S. 176 (1982)). In that case the United States Supreme Court set forth a two pronged test to determine whether a school district has offered a student a free appropriate public education (FAPE) in the least restrictive environment (LIZE). The first inquiry to be made is whether the school district has complied with the statutory procedures (no substantial procedural violations) required by the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. 1401 et seq. for services. Any denial of procedural rights must result in an adverse impact on the parent's participation or the Student's education so as to result in a loss of educational opportunity in order to be a denial of the law's requirement of a free appropriate publicly funded education (FAPE). The first test of Rowley allows relief only if the alleged procedural violations have resulted in substantial harm to the Student. W.G.V. Board of Trustees, 960 FF2d 1479, 1484 (Ninth Circuit 1992). The District is also under an obligation to fully evaluate the Student and conduct assessments in all areas related to the suspected disability (IAC 226.130(h)). Failure to do so would violate the law. Here, the District complied with most procedural requirements of the law. One exception was the participation of a regular class room teacher in the June 28, 2001 Conference where the IEP was written. In addition it is noted that the report from the June 4, 2001 MDC, where Tom Simms a seventh grade teacher attended, shows no participation on his part. The testimony of Dr. Shana Erenberg regarding her observations of Mr. Simm's Social Studies Program was very complimentary but went into great detail as to why the Student could not function in a class operating at such a high level and at such an accelerated pace. (TR.12-14-01p202-211).

The record demonstrates that there was very minimal contact with the Student himself. He left the District at fourth grade and attended Cove School for fifth, sixth and now seventh grade. The only persons who saw him for the School District were Mary Power, the Speech /Language (S/L) Pathologist who noted his inconsistent performance, problematic pragmatic skills, rigidity, need for verbal cueing and redirection and inconsistent language functioning even within sub-tests. Short-term auditory memory was above average on one test and well below average on another (Dxp38, 39). She recommended a moderate level of S/L services and apparently helped develop two goals in the IEP (Dxp 31, 32) as she attended the June 28, 2001 IEP Conference. She also did the Assistive Technology Evaluation with Susan Weinstein the Occupational Therapist (O/T) and the only other employee of District 65 who saw the Student. They recommended the use of a word prediction program, visual organizers and "Start to Finish" books which offer visual and auditory feed back and multiple choice tests to facilitate organized responses. (Dxp.40, 41) In her Occupational Therapy evaluation Susan Weinstein noted his history of Occupational Therapy services from 2 1/2 years of age through 1999 (fourth grade). She was with him for 1 1/2 hours and gave him a "Test of Visual/Motor Integration" including sub tests and found him to be in the average range while noting his mild left hemiparesis and ADHD as well as his considerable effort. She noted processing issues and did not have the opportunity to assess lunchroom, locker or management of backpack/bookbag (Dxp49-52). The Social Worker Andy Friedman interviewed the Mother, but not the Student (Dxp42-48).

The fact that the Student himself was never met by five of the eight District participants in the development is not a per se procedural violation but certainly raises questions. The June 4 MDC was noticed up on May 23, 2001, (Dxp15), so clearly the District could have sent someone to observe the Student at Cove School before the Summer recess began on June 7, 2001, even though the Parent did not request this. The District notes in its brief that such a limited and

isolated observation would be no substitute for a more prolonged evaluation in the proposed placement called for in the IEP, but that is not the function of an IEP. The IEP is a service commitment and the Parent is entitled to rely on it as the District proposal for educational and related services for the Student. (Knable v. Bexley City School District 238 F. 3d 768 (6th Cir.2001)) The lack of participation by a regular classroom teacher coupled with the dearth of information about the Student generated by the District was at best a poor educational practice. I stop short of finding an actual procedural violation since neither the Federal or State laws require a record of the MDC to show actual participation by the conferees and nothing in the act specifically prohibits developing an IEP with little direct knowledge of the child involved. It certainly however, renders suspect the IEP thus developed.

The second prong of the Rowley test is whether the individualized program developed through such procedures is reasonably calculated to enable the Student to receive educational benefits. (Rowley at 206-207) The Sixth Circuit recently set out in Tullahoma City Schools what it understands Rowley to mean by "reasonably calculated to enable the child to receive educational benefits". "The Act requires that the Tullahoma schools provide the educational equivalent of a serviceable Chevrolet to every handicapped student. Appellant, however, demands that the Tullahoma school system provide a Cadillac solely for appellant's use. We suspect that the Chevrolet offered to Appellant is in fact a much nicer model than that offered to the average Tullahoma student. Be that as it may, we hold that the Board is not required to provide a Cadillac." (Tullahoma City Schools, 9 F 3rd at 459-460) To paraphrase the Court in Metropolitan Nashville and Davidson County School System v. Guest (U.S. District Court, MD Tenn. 231 DELR 232) the question in this case is whether the placement at King Lab Middle School is a "serviceable Chevrolet".

The testimony of Dr. Shana Erenberg, the Parent's expert educator/witness, about the Student whom she saw and observed at Cove School, and whom she had known and worked with since the Summer of 2000, just after his sixth grade year at Cove, when coupled with her testimony describing an actual day in the classes at King Lab proposed for the Student in the IEP, leads inescapably to the conclusion that King Lab School - for this Student - does not satisfy the "serviceable" "Chevrolet" standard. It is not in any way the educational program this multiphysically handicapped, dyslexic, ADHD, emotionally fragile and socially delayed student requires in order to acquire at least a minimal benefit from the educational process. I found Dr. Erenberg to be truthful, highly experienced and competent, and a compelling, persuasive witness. Her knowledge and experience are extensive; she was qualified as an expert, she observed the program proposed for the Student at King Lab and she observed the Cove School program. In fact she was the only participant in the conferences who had observed both the school programs at issue and the Student himself. She is not employed by Cove and clearly has no prejudice against Evanston District #65, as she was highly complimentary of their program for regular education students. (TR.12-14-01p.211). She has testified as an educational expert between 20 and 25 times, frequently on behalf of school districts. (TR 12-14-Olp.6-20; Pxp303-310).

Dr. Erenberg testified fully about the program proposed for the Student and stated regarding each class the reasons why it was not appropriate for the Student. She went into particular detail about her experience observing Alan Studnitzer's class, which seems to be the centerpiece and linchpin of the Special Education Program offered by the District for the Student. Alan

Studnitzer is clearly a very committed, bright teacher with an engaging personality. However he is also an untenured second year teacher with little background or training in severe learning disabilities. He testified that his own daughter was dyslexic that he learned much from her, that experience was what brought him to teaching. She is now an honors student applying for colleges. He has a Masters degree (MAT) from National Louis University and EMH, TMH and Gifted certification. These are not the Student's handicapping conditions. Mr. Studnitzer has no special training to deal with most of the problems that affect this Student. He showed no real grasp of the approaches detailed by Dr. Erenberg. His classroom management skills have clearly not yet matured, given the description of what was going on there set forth in Dr. Erenberg's testimony and her written notes. (TR 12-14-01 p.1 19-134 and p.181-202, Dr. Erenberg Notes I.)

The program at Cove School is an entirely different situation as described by the Mother and Dr. Erenberg and contrasted with what is being offered in the IEP. The physical layout of the building is a small single floor layout in contrast to the large two-story building of King Lab. The class sizes are all small, instructional materials are appropriate to the Student's academic level. A true multi-sensory methodology is used throughout the curriculum. Use of the "head set" system assists with his attentional problems and auditory processing difficulties. The Mother testified that he no longer comes home crying and overwhelmed with three hours of homework but has become confident of his skills. Bullies do not target him, he no longer feels ostracized or different. "He is a happy kid".

The District has failed to recommend any thing approaching a viable alternative; it has offered instead an inappropriate, mostly mainstreamed IEP from which this particular Student would receive little or no educational benefit. The only appropriate option in the record before the Hearing Officer is the private placement at Cove. For this Student it is the LRE where he can be appropriately educated. Mainstreaming is not required in cases where it would be detrimental to the Student as it would here. Board of Education of Murphysboro v. Illinois State Board of Education 41 F.3rd 1162 (7th Cir.1994) is instructive here and applies to this hearing. IDEA does not mandate an optimal education, or one, which will allow a Student to reach maximum or full potential, only an appropriate one, from which the Student derives educational value. The IEP proposed by District 65 does not meet even this minimum test. The Parent in this case was entitled to rely on what was proposed. She is not required to uproot a multiple-handicapped, relatively fragile adolescent and put him in an inappropriate program so the District could observe him for four to six weeks and then propose modifications to make it appropriate. The District cannot accept all the input from the Parent and her evaluator/expert, with none of its own from any academic or non-related service personnel who has had contact with the Student, and then reject all the conclusions and recommendations because of a preference for mainstreaming. The Hearing Officer finds on the issues as follows:

1. Placement at Cove School for the 2001-2002 school year is required to provide the Student with an appropriate education.
2. Placement at Cove School is the least restrictive environment for this Student.

3. The District did not offer an appropriate program or an appropriate IEP for the Student for the 2001-2002 school year.
4. The School District should reimburse the Parent for tuition at Cove School beginning from June 28, 2001 and for the cost of the evaluations and testing done by Dr. Sharon Erenberg and provided to and relied upon by the District at the June 4, 2001 and June 28, 2001 Conferences.

ORDER

1. The Parent shall be reimbursed by the District for tuition at Cove School for services since June 28, 2001.
2. The District upon presentation of appropriate invoices shall make future payments to Cove School directly to Cove School on behalf of the Student.
3. The District is to be reimbursed as set forth in the School Code by ISBE.
4. The district shall submit proof of compliance with this order to the Illinois State Board of Education, Program Compliance Division, 100 North First Street, Springfield, Illinois 62777 within 35 days from the receipt of this decision.

RIGHT TO REQUEST CLARIFICATION

Either party may request clarification of this decision by submitting a written request for such clarification to the undersigned hearing officer within five (5) days of receipt of this decision. The request for clarification shall specify the portions of the decision for which clarification is sought, and a copy of the request shall be mailed to the other parties and to the Illinois State Board of Education. The **right to request such a clarification does not permit a party to request reconsideration of the decision itself, and the hearing officer is not authorized to entertain a request for reconsideration.**

RIGHT TO FILE A CIVIL ACTION

This decision shall be binding upon the parties unless a civil action is commenced. Any party to this hearing aggrieved by this final decision has the right to commence a civil action with respect to the issues presented in the hearing. Pursuant to ILCS 5/14-8.01(i), that civil action shall be brought in any court of competent jurisdiction within 120 days after a copy of this decision is mailed to the parties.

CERTIFICATE OF SERVICE

The undersigned hearing officer certifies that she served copies of the aforesaid Decision and Order upon Parent, District and its counsel, and the Illinois State Board of Education at their stated addresses by depositing same with the United States Postal Service at Oak Park, Illinois with postage prepaid before 6:00 PM on February 4, 2002, and by fax on February 3, 2002 to the Attorneys for both Parties and the ISBE.

JUDGE JULIA QUINN DEMPSEY
IMPARTIAL DUE PROCESS HEARING OFFICER

ENTER: February 3, 2002