

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IDEA DUE PROCESS HEARING

In the matter of:)
 [REDACTED] on)
 behalf of [REDACTED] a minor,)
 Petitioners)

v.)

HEARING OFFICER DECISION

Spartanburg School District Two)
 Respondent)

This matter is before me upon the request of the School District that I serve as the independent Hearing Officer in this matter as presented to me in a letter dated November 18, 2009. On November 23, a letter was sent to Elizabeth Robinson, Counsel for the Petitioner informing her of her client's rights and responsibilities under a Due Process Hearing. On November 20, the Respondent District issued its response to the Petitioner's request for a Due Process Hearing. On November 24, the parties held a resolutions session and by letter of November 25, they requested the balance of the thirty (30) day Resolution period to attempt a settlement. That request was granted.

Just prior to the Christmas Holiday's it was learned that the mother of the Petitioner's Counsel had passed away and with the agreement of the parties, the deadline for holding a hearing was extended. On January 7, a teleconference was held and it was agreed that the Hearing would be held on February 8 and 9, 2010 with the date for the exchange of witness lists and evidence being February 1.

On the appointed date and time, the parties gathered and at a pre-hearing conference it was determined that the witness list and evidence exchange had been

accomplished without difficulty and all other pretrial matters had been successfully resolved. The matter was ready for the Hearing and after opening statements testimony began.

FACTS

The following items are found to be facts that were proved by testimony or documentary evidence:

1. [REDACTED] is a fourteen (14) year old male child currently in the 9th grade on a diploma tract taking college preparatory classes.
2. The child is in his third (3rd) year of special education.
3. As a result of a pre-referral screening, it was determined that the child had an average IQ (104) but inconsistent results on tests administered indicated that he may be eligible for Special Education services (School District Exhibit #1).
4. The [REDACTED] had been diagnosed as suffering from Attention Deficit and Hyperactivity Disorder (ADHD) by Dr. Heyward Nettles, M.D. in September, 2004) (School District Exhibit #2)
5. An evaluation was performed by School Psychologist Dr. Martha D. Petoskey in January of 2005, which found a "low average" IQ of 84 utilizing the WISC-IV test and other tests given placed his abilities and achievement in the average range (School District Exhibit #2 and testimony of Dr. Petoskey).
4. A follow-up evaluation in 2007 by Dr. Petoskey produced similar results as the first evaluation and she found that [REDACTED] ADHD was not "adversely affecting his performance in the regular classroom sufficiently to warrant special education services at this time." (School District Exhibit #4 and testimony of Dr. Petoskey).
5. An Independent Evaluation was performed by Dr. Ben Rigby in February 2009 at the Speech, Hearing & Learning Center, Inc. in Greenville, South Carolina. Dr. Rigby found the [REDACTED] had an average IQ {95 on the Reynolds Intellectual Assessment Scale (RIAS)} and recommended that [REDACTED] IEP be modified by adding a second area of disability, i.e. a specific disability in listening comprehension. (School District Exhibit 5 and Dr. Rigby's testimony).

6. In August 2007, the District and the Petitioners met and formulated an IEP for ██████ placing him in regular education classes with accommodations including preferential seating near the teacher, extended time to complete tests, extended time to complete assignments, test/assignments read orally by teacher or assistive technology, a tutor, calculator use on assignments and tests, a copy of all completed notes and an extra set of books for use at home. It also established short term objectives and goals in writing, math and reading to be in a classroom with both a special education and regular education teacher. The IEP was adopted and signed by the Petitioner (School District Exhibit #6).
7. Progress reports for that IEP showed some progress (School District Exhibit #6)
8. In April 2008 an IEP meeting was held to review ██████ IEP and a new one was adopted and signed by the Petitioner (School District Exhibit #7)
9. In August 2008 an IEP meeting was held and at the request of Ms. Elam, soon to be ██████ reading teacher, and she requested that a tutorial reading program be added to the IEP. The Petitioner requested that Standardized Tests not be read orally to ██████ but that this option remain for the classroom. A reading program, Plugged-In to Reading, was also added. These changes were included in ██████ IEP and it was signed by the Petitioner (School District Exhibit 8 and testimony of Ms. Elam and Petitioner).
10. A Running Reading Record was kept by Ms. Elam regarding the progress made in the tutorial program which showed improvement by ██████ during the year (School District Exhibit #12, testimony of Ms. Elam and Ms. Oliver).
11. In April 2009 an IEP meeting was held and it was agreed that ██████ would be moved from an inclusion/consultant model to a resources model for his education, remaining in regular education classes on a Diploma Tract (School District Exhibit #9, testimony of Petitioner, Mr. Enloe).
12. In January 2009 a Dominic Reading Assessment was administered by Felicia Oliver showing ██████ in reading 4th grade materials with proficiency but not able to comprehend material typically used in higher grades. She indicated that ██████ was a fluent reader but he had "no apparent recognition that reading is a meaning-making process" (School District Exhibit #10 and testimony of Ms. Oliver and Ms. Elam).

13. In July 2009 a follow-up Dominie Reading Assessment was given to ■■■ showing dramatic improvement (School District Exhibit #11 and Testimony of Ms. Oliver, Ms. Elam and the Petitioner).
14. During the 7th, 8th and 9th grades, ■■■ had taken MAP standardized tests and the results were mixed but showed dramatic improvement in the 9th Grade (Petitioner's Exhibit #3, table in Petitioner's tab 8E, Testimony of Ms. Oliver, Ms. Elam, Mr. Enloe and the Petitioner).
15. During the Spring and summer of 2009, the Petitioner enrolled ■■■ in two reading programs, one in Greer, South Carolina called Strides at a cost of One Thousand One Hundred Fifty-four and xx/100 (\$1,154.00) Dollars and one in Charlotte called Lindamood-Bell at a cost of Two Thousand Nine Hundred Ninety-two and xx/100 (\$2,992.00) Dollars (Testimony of the Petitioner and Petitioner's Exhibit #11).
16. During his time in 7th, 8th and 9th grade ■■■ was being educated in regular education classes, was in the Diploma Tract program and received passing grades including in his college preparatory classes (Testimony of Mr. Enloe, Ms. Flowe, Mr. Hill, Ms. Bayliff)

DISCUSSION OF ISSUES AND CONCLUSIONS

This case is one where the Petitioners are alleging that their son, ■■■ did not receive FAPE (Free Appropriate Public Education) because his IEP's did not adequately address a specific learning disability in reading comprehension. As a result, the Petitioners, in frustration and out of a sense of anxiety that their son was at a crucial learning stage purchased outside reading assistance and now wants to be reimbursed by the District for those services. They point to his dramatic improvement in July 2009 on the Dominie Reading Assessment follow-up test and his dramatic increases in his MAP standardized test scores in the fall of 2009 after receiving outside private reading services as proof that the School District's program had failed. In addition, they called a witness, Dr. Stephanie Trevitz, qualified as an expert in Special Education and Dr. Ben Rigby, qualified as an expert in Psychology. Dr. Trevitz dissected the various IEP's prepared for ■■■ with a critical eye pointing out vagueness and a lack of preciseness with

respect to [REDACTED] goals and the measurement of those goals. (Testimony of Dr. Trevitz). Dr. Rigby's testimony centered on his own evaluation of [REDACTED], the results and comparisons with evaluations performed by Dr. Martha Petoskey, the District's School Psychologist. While disagreeing with Dr. Petoskey's findings relating to IQ and whether or not [REDACTED] had a specific learning disability, he generally agreed that [REDACTED] was in the Average IQ range but felt that he did have a "specific learning disability in listening comprehension and has relative weaknesses in the areas of reading fluency and reading comprehension" (Rigby Evaluation page 81, *Conclusions*).

It is the District's position that they provided IEP's for [REDACTED] that were reasonably designed for him to make meaningful educational progress and that, in fact, he did make progress on his special education goals, obtaining B's and C's in regular education classes in the Diploma Tract some of which were college preparatory including English and Literature. They base their case on the testimony of teachers, the various standardized tests performed during the 7th, 8th and 9th grade and his report cards and progress reports showing that he was in the average range compared to his peers and that he was progressing in that range as the years and grades went by in regular education classes. Although the District did not seek to qualify their witnesses as experts, they all were experienced and credentialed teachers and education professionals, some of who had substantial resumes.

This case, as is the case so many others seeking reimbursement, revolves around the rulings in the line of cases known as *Carter-Burlington* named for *Florence County Sch. District Four, et al. v. Shannon Carter*, 510 US 7 (1993) and *Burlington Sch. Committee. v. Mass. Bd. of Ed.* 471 US 359 (1983). In these cases, the Supreme Court

concluded that parents could be reimbursed for expenses paid to private schools or service providers under certain circumstances. Those circumstances had to meet the following test: (1) the School District did not provide the student with FAPE; and (2) the private school or service provider offered a program that did, in fact, provide the student with FAPE.

In the case before me, the District's program must be measured against the standard established by the case of *Board of Ed. of Hendrick Hudson Central School Dist. v. Rowley*, 458 US 176 (1982) and subsequent cases. That test is that a District must offer a special education student and individualized educational plan (IEP) that is reasonably calculated to offer him or her the opportunity to make meaningful educational progress. If it does so, then it has offered FAPE. In order to determine whether or not the IEP is working, the District must show that the student has, in fact, made some educational progress. Specifically, the IEP "should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade," *Id.* p. 204.

Since the Petitioner's are seeking relief, attacking the IEP and alleging that the District did not provide [REDACTED] with FAPE because they misdiagnosed him and did not provide him with an educational program from which he could make meaningful educational progress, they have the burden of proof in this case, *Schaffer v. Weast*, 546 U.S. ____ (2005). While the Courts have ruled that "great deference" should be given to the educators who developed the IEP (*JSK v. Hendry County School Board*, 941 F.2nd 1563, 1573 (11th Cir. 1991) that deference can be overcome by evidence. The real question here is the issue of whether or not he made academic progress.

ISSUES

1. Did the District make the appropriate diagnosis of [REDACTED]?

Dr. Rigby's testimony was that it did not. He testified that he believed that [REDACTED] had a specific learning disability. Dr. Petoskey, who performed two evaluations, two (2) years apart, did not believe that [REDACTED] even qualified for Special Education services, finding him to be of low average intelligence and progressing normally. (School District Exhibits 2 and 3). However, her testing did show "Low Average" results in the area of reading comprehension and writing samples. Dr. Rigby's conclusions with almost identical results were that he had a specific learning disability. The real bone of contention between the two revolved around the IQ scores obtained. Dr. Petoskey got a Full Scale IQ score of 84 in 2005 and 73 in 2007 using the WISC-IV test. Dr. Rigby found a 95 utilizing a different test the RIAS. Dr. Petoskey, who studied under the researchers who developed the RIAS and was part of its development, felt that it was not the best test to use in this case. However, for the purpose of this discussion the differences, although important to the two doctors, the family and the District, do not change the fact that all the tests place [REDACTED] in the average intelligence range.

In spite of Dr. Petoskey's findings, the District decided to provide [REDACTED] with special education services with an emphasis on improving his reading skills. Thus, even if the diagnosis by the psychologists differ, the deficiency noted was being addressed by the District. In fact many of Dr. Rigby's recommendations had been utilized or were being adopted even before his evaluation the differences seemed to revolve around methodology and not the actual focus of the educational efforts.

2. Was the District's IEP defective?

The IDEA and its regulations define what an IEP is:

“(a) *General.* As used in this part, the term individualized educational program or IEP means a written statement for each child with a disability that is developed, reviewed, and revisited in a meeting in accordance with Sections 300.320 through 300.324 ...” (34 CFR 300.320).

The definition goes on to establish specific items that must be included in the form, all of which are met by the South Carolina form used by the District. The issue raised by the Petitioner is whether or not the way the District selected goals, measuring methods and presented █████ academic achievements and abilities, was deficient.

If you accept Dr. Trevitz's testimony without reservation, it is clear that the IEP format utilized by the District leaves something to be desired. In fact, in my experience it is rare that IEP's are without mistakes or flaws. The issue we must deal with is not whether or not the IEP is worded correctly or whether or not it utilizes statistical or objective empirical measures of progress, but rather whether or not the program offered produced results. Procedural errors that do not impact the effectiveness of the program or impede the educational progress of the child must not be determinative as to the relief sought here. In this case, the educational program, accommodations and services provided did allow █████ to progress academically.

3. Did the District offer █████ FAPE?

In addition to the *Rowley* standard of FAPE we have a regulatory standard which basically says that FAPE is an education provided free of cost to the family at a public school meeting the standards of the SEA (State Education Authority) offering an appropriate educational program for children of the age of █████ with his disabilities and that his educational program is governed by an IEP meeting the regulatory standards

of the law (34 CFR 300.17). In the *Rowley* case, the Supreme Court said that in addition to the statutory and regulatory standards for FAPE, the child's educational program must be reasonably designed to offer him or her an opportunity for meaningful educational progress. The Court also said that this educational program does not have to be the optimal or very best program available, but must provide a "floor of opportunity" from which the student can progress. The measure of whether or not a child has been offered FAPE is the progress he has made.

In this case, [REDACTED] was achieving passing grades in regular education classes designed to prepare him for college. This is not a case where he was simply being promoted, year to year; he was actually earning those grades (Testimony of Mr. Enloe, Ms. Grubbs, Mr. Hill and the Petitioner). The MAP, PACT and PASS test results showed him consistently in the average to low average range of academic achievement as compared to his peers during this period and even though there was some fluctuation in those scores, in order for him to not be progressing, they would have had to decline since the educational skills necessary to be consistent with his peers, increase each year. The measuring stick does not remain static, the level of difficulty increases with each year of testing.

In [REDACTED] case the Petitioner contends that he made little or no progress under the District's IEP and it was not until they purchased other services that he began to flourish educationally. There is little doubt that in the 9th grade or thereafter, something or a combination of things clicked and [REDACTED] finally got it. He began reading and comprehending what he was reading; his test scores went up; and he gained confidence academically. However, his grades remained consistent, B's and C's. It is hard to tell

if it was the years of District efforts, the new programs he was exposed to, the fact that he began to realize the importance of education, physical and emotional maturity, or a combination of some or all of those things. The bottom line is that regardless of the variation in standardized test scores or the performance on psychological tests which only provide a snap shot of the child on a given day, it is hard to ignore the fact that the one constant is [REDACTED] grades in regular education classes. Yes, he had some accommodations and yes, his loving mother spent hours with him helping with his homework, but he was doing grade level work in a Diploma Tract including some college preparatory classes and he was getting B's and C's and progressing from grade to grade. That meets the definition of "progress" for the purposes of FAPE.

4. Did the program at Lindamood-Bell and Strides offer F.B. FAPE?

It is hard to tell. No witnesses were offered from either program nor were we given the benefit of any documentation about the programs and how they worked. The only evidence offered regarding these programs was a couple of letters, the apparent progress by [REDACTED] on test scores and the bill for their services. However, if the District offered FAPE, under the *Carter-Burlington* test, we don't have to reach this issue.

DECISION

[REDACTED] is a lucky guy. He has dedicated parents who have fought for him, spent hours of their precious time, numerous dollars and much emotion making sure that he receives as good an education as possible. Whatever he does in life he will always have the support of a loving family and that is worth a lot in the world in which we live.

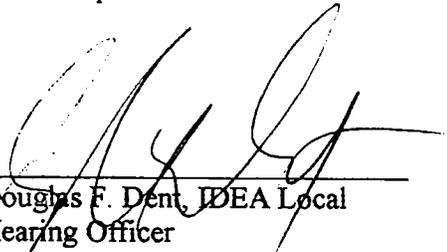
However, here they are asking that under IDEA and its accompanying regulations, and decisions of the Courts, they be awarded money damages for the cost

of the Strides program and Lindamood-Bell programs they purchased for him because they allege that the School District did not do its job in offering him an individualized educational program from which he could be reasonably be expected to make educational progress. But the evidence does not support that theory.

The program the District provided was individualized. His teachers carried out the program to the best of their abilities with compassion and the dedication of professionals. It was free and offered at a public school meeting SEA standards. It was appropriate for his age, ability and disability and he made academic progress.

Therefore, it is hereby ordered that the Petitioner's request for reimbursement is denied and this matter is dismissed with prejudice.

Greenville, South Carolina
February 21, 2010



Douglas F. Dent, IDEA Local
Hearing Officer

APPEAL

Should either party wish to appeal this ruling they may do so by writing a letter to the South Carolina Department of Education, Division for Exceptional Children, 1429 Senate Street, Rutledge Building, Columbia, South Carolina 29201 within ten (10) days of receipt of the Hearing Officer's Order.