

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

B.A., as parent and next friend of P.A., a
minor,

Plaintiff

v.

Civil No. 99-164-P-C

CAPE ELIZABETH SCHOOL
COMMITTEE,

Defendant

GENE CARTER, District Judge

MEMORANDUM OF DECISION AND ORDER

Plaintiff B.A., as parent and next friend of minor P.A., challenges the decision of an administrative hearing officer that upheld the individualized educational programs (“IEP” or “IEPs”) established by the Cape Elizabeth School Committee (“CESC”) for P.A., and rejected B.A.’s petition for reimbursement of tuition, room, board, transportation, and related costs associated with P.A.’s placement at the Landmark School. Plaintiff contends that the hearing officer’s decision is inconsistent with the Individuals with Disabilities Education Act (“IDEA”) 20 U.S.C. §§ 1400-91, and the Maine special education law, 20-A M.R.S.A. §§ 7001-8101. After a careful review of the decision, as well as of the testimonial and documentary record upon which the decision is based, the Court will affirm the hearing officer’s decision.

I. Factual and Procedural Background

P.A. attended the Cape Elizabeth school system for the fifth, sixth, and seventh grades. There is no dispute that during that time, P.A. had been identified as a student with a learning disability under the IDEA and the Maine special education law. Cape Elizabeth school officials established IEPs for P.A. for her fifth, sixth, and seventh grade school years. P.A. was

mainstreamed for some courses, primarily social studies and science, and received special education for mathematics, reading, and writing. In her mainstreamed classes, P.A. routinely received excellent marks – As and Bs. Her teachers made clear that those grades were not adjusted to reflect her learning disability but, instead, represented her mastery of the subject material relative to her classmates without learning disabilities. The amount of special education instruction that P.A. received increased – in terms of time – each of her three years in the Cape Elizabeth school system, from approximately eight hours per week in fifth grade to over eleven hours per week in seventh grade. Although the special education goals set for P.A. by her Pupil Evaluation Team (“PET”) were not always met, her teachers agreed that P.A. was making meaningful progress throughout her three years in the Cape Elizabeth School system. Prior to starting her eighth grade year, B.A. removed P.A. from the Cape Elizabeth school system and placed her in the Landmark School, a private residential school for students with learning disabilities.

Despite P.A.’s transfer to the Landmark School, Cape Elizabeth school officials went ahead and created an eighth grade IEP for P.A. CESC then sought an administrative hearing in an effort to validate the IEP created for P.A.’s eighth grade year. At that hearing, B.A. challenged the IEPs established for P.A.’s fifth, six, and seventh grade years. Additionally, B.A. sought a finding from the hearing officer that she was entitled to reimbursement for the tuition, room, board, transportation, and related costs associated with P.A.’s attendance at the Landmark School.

After hearing four days of testimony and legal argument, and after reviewing 500 pages of evidentiary and legal documents, the hearing officer issued a detailed decision setting forth findings of fact and conclusions of law. The hearing officer determined that the IEPs created for P.A. for her fifth, six, and seventh grades met the requirements of the IDEA as well as the Maine special education law. The hearing officer reached a similar conclusion with respect to the IEP that had been prepared for P.A.’s eighth grade year, but which had never been implemented.

Finally, the hearing officer determined that B.A. was not entitled to reimbursement for the costs associated with P.A.'s placement in the Landmark School.

Plaintiff challenges all three of the hearing officer's decisions. Plaintiff contends that all of the IEPs created for P.A. were insufficient because they failed to address P.A.'s social and emotional disabilities arising out of her educational disabilities. Furthermore, Plaintiff contends that she is entitled to reimbursement for the expenses of the Landmark School under either of two theories. First, reimbursement is appropriate, Plaintiff contends, because P.A.'s disability warrants placement in a residential education program like the Landmark School. Alternatively, Plaintiff contends that she is entitled to reimbursement as an award of enhanced services to make up for past violations of the IDEA.

After filing a challenge with this Court, Plaintiff sought to supplement the hearing record with an affidavit by Debra Napolitano. Ms. Napolitano was not allowed to testify at the hearing after the hearing officer determined that her testimony would be unnecessarily cumulative and was of marginal relevance. After considering briefs from both parties, this Court issued an Order (Docket No. 13) allowing Plaintiff to submit an affidavit from Ms. Napolitano. That affidavit, (Docket No. 14), as well as the transcript of the deposition of Ms. Napolitano, is now part of the record that this Court has reviewed.

II. Analysis

The IDEA explicitly allows a party to appeal a hearing officer's decision to a federal district court. In reviewing a hearing officer's decision, the IDEA directs that the court:

- (i) shall receive the records of the administrative proceedings;
- (ii) shall hear additional evidence at the request of a party; and
- (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

20 U.S.C. § 1415(i)(2)(B). The Court of Appeals for the First Circuit has characterized the standard of review for IDEA cases as being more vigorous than clear error review, but falling well short of *de novo* review. *Lenn v. Portland School Committee*, 998 F.2d 1083, 1086 (1st Cir.

1993). Within this district, further elucidation of the standard set forth in *Lenn* has been achieved by the adoption of a three-step process to review a decision of a hearing officer under the IDEA.

First, the Court carefully reviews the entire record of the due process hearing. Second, appropriate deference is given the Hearing Officer and [her] expertise, *particularly with regard to factual determinations*. Finally, the Court makes an independent decision whether the Hearing Officer's determination is supported by a preponderance of the evidence. The Court may also account for additional facts presented by the parties should it find such facts credible and supported by the evidence on the record.

Greenbush School Committee v. Mr. and Mrs. K, 949 F. Supp. 934, 938 (D. Me. 1996) (emphasis added).

Boiled down to its essentials, Plaintiff's argument challenges the hearing officer's factual findings, as opposed to her legal conclusions. Specifically, Plaintiff contends that the hearing officer improperly disregarded evidence that P.A.'s IEPs failed to assess and address P.A.'s emotional and social difficulties arising out of her learning disability. B.A. contends that P.A. suffered depression as she struggled to accept her learning disability. Furthermore, B.A. contends that P.A. suffered socially as a result of her learning disability. Plaintiff's brief characterizes P.A.'s plight in the most serious terms by repeatedly indicating that P.A. had become suicidal. B.A. contends that P.A.'s problems became serious near the end of her sixth grade year, and worsened during her seventh grade year. B.A. contends that P.A.'s PET failed to recognize P.A.'s depression and social isolation and, accordingly, that P.A.'s IEPs were inadequate because they failed to confront these problems.

Defendant counters that Plaintiff is exaggerating P.A.'s emotional and social difficulties. Defendant points to testimony by P.A.'s teachers that demonstrate that P.A. was generally happy in school. Further, Defendant contends that it should not be required to pay for P.A.'s placement at the Landmark School even if it failed to address P.A.'s alleged social and emotional difficulties.

The hearing officer was faced with contradictory testimony regarding P.A.’s emotional and social well-being. While P.A.’s teachers did not see her emotional or social health as being abnormal for a child of her age, B.A. described her child as intensely sad and depressed. The hearing officer did not discount B.A.’s testimony, as Plaintiff’s brief states. Indeed, the hearing officer indicated that she did not “doubt that the student was sad and depressed about her disability, and that it had an impact on her education.” Decision at 14 (Attached to Complaint (Docket No. 1) as Exhibit No. 1). Instead, the hearing officer placed greater weight on the testimony of B.A.’s teachers. With regard to P.A.’s emotional state, as witnessed by her teachers, the hearing officer noted that P.A. “was described as bright, creative, artistic, sensitive, kind, caring, humourous, bubbly, and flamboyant.” Decision at 9. With regard to P.A.’s social interaction at school – again, as witnessed by her teachers – the hearing officer found the following: “She was observed to have appropriate peer interactions at school. She related in typical adolescent fashion with peers, both in classroom situations and free-time activity.” Decision at 14.

Deference to the fact finder is a well-settled principle of judicial review. The person who was present to see the witnesses and hear the testimony is in a much better position to assess the intangibles – such as credibility - than is the reviewing court who has merely the assistance of a (aptly named) “cold” record. Because there is ample evidence in the record to support the conclusions of the hearing officer, this Court must not and will not disturb those findings, regardless of the credible contrary evidence identified by Plaintiff.¹ From the record, it appears

¹ In addition to pointing out contradictory evidence in the record, Plaintiff challenged the hearing officer’s impartiality. “The hearing officer demonstrating her *hostility* to the parent’s case by ignoring and, in one case, expressly excluding evidence offered by the parent” Plaintiff’s Memorandum (Docket No. 16) at 2 (emphasis added). The decision by the hearing officer to exclude the testimony of Ms. Napolitano was a reasonable one based on familiar evidentiary principles which were explained to Plaintiff’s attorney during the hearing. Hearing Transcript at 738, 877. The hearing officer also let Plaintiff’s attorney make an offer of proof on the record as to what Ms. Napolitano’s testimony would have been. Hearing Transcript at 875-77. That this Court has subsequently allowed Plaintiff to submit an affidavit from Ms.

(continued...)

that the hearing officer faced a difficult decision in light of contradictory testimony. This Court knows from experience that such decisions are best left to the original fact finder. The Court finds that the factual conclusions of the hearing officer are supported by a preponderance of the evidence. *Cf. Greenbush School Committee*, 949 F. Supp. at 938. Accordingly, the Court will affirm the decision of the hearing officer.

Because the Court accepts the hearing officer's finding, the Court need not address Defendant's counter argument that even if Defendant failed to address any of P.A.'s alleged social or emotional problems, such failure does not require CESC to pay for P.A.'s placement at the Landmark School.

III. Conclusion

After a careful review of the entire record of the hearing, the supplemental affidavit of Debra Napolitano, the briefs of both parties, and the decision of the hearing officer, the Court finds that the decision of the hearing officer is reasonable and supported by a preponderance of the evidence. Accordingly, the Court **ORDERS** that the decision of the hearing officer be, and it is hereby, **AFFIRMED**.

GENE CARTER
District Judge

Dated at Portland, Maine this 30th day of May, 2000.

¹(...continued)
Napolitano is of no moment.

In reviewing the record, the Court uncovered nothing to suggest that the hearing officer acted other than fairly and impartially. The Court is troubled by what the Court finds to be Plaintiff's unsupported accusation of "hostility" on the part of the hearing officer. A fact finder routinely must choose between two viable, but contrary factual scenarios. It is irresponsible to suggest – without some additional proof – that, by finding contested facts in a manner more favorable to Defendant, the hearing officer was acting in a hostile manner towards Plaintiff.

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