

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ROME SCHOOL COMMITTEE,)
)
Plaintiff)
)
v.) Civil No. 99-CV-198-B
)
MRS. B.,)
)
Defendant)

***RECOMMENDED DECISION ON PLAINTIFF’S APPEAL OF HEARING OFFICER’S
DECISION UNDER THE INDIVIDUAL WITH DISABILITIES AND EDUCATION ACT***

Plaintiff, Rome School Committee, challenges the administrative hearing officer’s decision that rejected Plaintiff’s individualized educational program (“IEP”) for DC, a twelve year old student, for the 1999-2000 school year. Plaintiff contends that the hearing officer exceeded her authority and violated provisions of the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §§ 1400-1491, and state special education law, 20-A M.R.S.A. §§ 7001-8101. For reasons delineated below, I recommend that the Court REVERSE the hearing officer’s decision.

Procedural Background

This is a companion case to *Rome School Committee v. Mrs. B*, Civil No. 99-20-B (hereinafter referred to as “*Rome I*”). In *Rome I* Plaintiff appealed the hearing officer’s finding that, among other things, Plaintiff violated the IDEA by not developing a 1998-1999 IEP that provided DC a “free appropriate public education” with regard to DC’s behavioral challenges. While Plaintiff appealed the hearing officer’s decision to this Court, it prepared a 1999-2000 IEP for DC. Mrs. B requested a hearing to challenge the proposed IEP. In an August 7, 1999

decision, the hearing officer found that the proposed 1999-2000 IEP did not provide DC with a free appropriate public education and approved DC's continued residential placement at Valley View School in North Brookfield, Massachusetts. The hearing officer ordered the school to fully fund the tuition and transportation costs associated with sending DC to Valley View. Plaintiff now appeals the hearing officer's decision.

Factual Background¹

The school held a pupil evaluation team ("PET") on May 18, 1999 and developed a draft 1999-2000 IEP for DC. At the PET meeting DC's parents indicated that the academic levels relied on by the school in the draft IEP were incorrect because they were at least fifteen months old. *R 108*. The school reminded the parents that they had refused the school's request since January 1999 to test and evaluate DC. The parents then agreed to allow school officials to evaluate DC for the purpose of developing a 1999-2000 IEP. *R 108*.

Based on the contents of the draft IEP Mrs. B requested a due process hearing to challenge the IEP on June 1, 1999. The school received the results of DC's evaluations on July 2, 1999 and incorporated those results into the final IEP days before the August 7, 1999 hearing.

The 1999/2000 IEP

After the hearing officer found the 1998-1999 IEP inadequate, the school hired Dr. David Moran, a behavior specialist employed by the Waterville School District, to construct a behavioral plan for DC. Before developing the plan Dr. Moran visited Valley View and spoke with staff, two teachers and two administrators for more than an hour. Valley View refused Dr. Moran's request to observe DC in the classroom because it was against school policy. Dr. Moran

¹ In *Rome I* the Court sets forth events preceding the development of the 1999-2000 IEP.

did not interview DC but did question Valley View staff about DC's progress at Valley View.

The following is a summary of Dr. Moran's testimony composed by the hearing officer regarding DC's behavior at Valley View:

He was told that the student's classroom behavior was more positive compared to the non-academic part of the day. The student is an avid reader even though his reading level is low. The student has lots of knowledge and is a good conversationalist. He likes being helpful to teachers by doing odd jobs such as passing out handouts. The student will refuse to do work because of "skill deficiency," especially written work. He loves sports which occupy his free time. He is likely to berate peers and he seeks attention from the older boys. He can lash out with physical actions on a few occasions. Dr. Moran was given the opportunity to interview the student but chose not to do so, as the major purpose of the visit was the present levels and not reinforcers. Dr. Moran stated that the student fits the general profile of public school kids and "we could do a better job than Valley View." Dr. Moran had only a verbal "general description" of the Valley View Behavior Plan. Dr. Moran did not speak with Dr. Ciottone, the student's individual counselor.

R 253. Based on this and other information, including evaluations done on DC by the school after the May 1999 PET meeting Dr. Moran prepared a behavioral plan for the IEP.

The plan prepared by Dr. Moran and offered by the school in the 1999/2000 IEP expands upon the services offered by it in the 1998/1999 IEP. The IEP places DC at Belgrade Central. DC would spend two hours each day receiving direct special education services as part of a small group. The focus of the special education services would be to address DC's learning disabilities and to assist him with homework from his regular education courses.

The plan calls for DC to be mainstreamed with other students the rest of the school day. During the period DC is mainstreamed, an educational aide would implement the behavioral plan designed by Dr. Moran. The plan delineates five acceleration targets: speaking and interacting with peers; acting on academic and self-management directions within one minute; remaining in

assigned areas during academic and leisure periods; completing work as assigned by the teacher or technician; asking for and taking a five minute break to avoid defiant and disruptive behavior. The plan also delineates five similar deceleration targets. *R 93.*

To meet the targets in the plan an educational aide would measure DC's behavior every half hour. If DC met certain behavioral goals he could earn up to two awards per day. The school would set the baselines for DC's behavior the first week of school. In addition, DC would meet with a psychologist once a week to receive counseling. Once a month Dr. Moran would review the plan and DC's progress and recommend any changes that need to be made. Thirty minutes every week DC's on-site providers would meet to address DC's progress and formulate any questions to pose to Dr. Moran. Finally four days a week DC would spend an extra hour at school to complete his homework.²

² The school first offered alternative placement at the Swasey School, a Goodwill-Hinckley Day Treatment School, at the August 7, 1999 hearing. The school district offered placement at this late date because a spot had just recently opened up at the school and it wanted to give Mrs. B another placement option in light of her distrust of the school district's ability to address DC's needs. Because the Court recommends that the 1999-2000 IEP provides a free appropriate public education to DC it need not address the sufficiency of DC's possible placement at the Swasey School. Below is a brief description of the type of services that are offered by the Swasey School.

The Swasey School is state approved and offers placement for students from two high schools and for students who are referred from area public school PETs. The hearing officer described the type of student who attends Swasey School:

Typical students referred would be experiencing difficulties in their present educational setting such as consistent disruption of the learning of others, difficulty remaining on task, unacceptable levels of negative interactions with staff, difficulty relating to peers, inappropriate reactions to others, i.e., verbally or physically assaultive, etc.

R 256.

Each student at the school meets with a masters level therapist three times a week. In addition a family support worker is assigned to each student to work with the student and the family. The behavioral model at the school grants the student privileges to reinforce good

Hearing Officer's Decision

The hearing officer found that both the Belgrade Central placement and alternate Swasey School placement denied DC a free appropriate education under the IDEA. The hearing officer concluded that:

The student's IEP [7/2/99] calling for placement in the Belgrade Central School or placement at a day treatment facility with no meaningful extended day program that carries over into all aspects of the student's day denies the student *FAPE*. Evidence supports that the student requires a "24/7" consistency to receive benefit. The school and the school's expert made the assertion that the school does not have to deal with the student's behavior challenges at home or in other settings. Dr. Moran, school's behavior expert, stated that behavior improvements at school typically do not carry over to the home. School attorney's closing argument presented case law that dealt with students whose other needs were clearly separate from their academic needs.

This hearing officer believes that the student's out-of-school behavior does need to be addressed in the student's educational plan in order for the student to receive benefit. The school does address the student's limited social skills and his inability to control frustration and maintain attention in his present *IEP*. Dr. Moran viewed peer relations as the student's primary goal after speaking with Valley View staff in late Spring. These behaviors carry over out of school. A "24/7" consistent environment assures that the behavior needs are monitored at all times and the child is accountable.

R 259. The hearing officer placed great weight on the fact that since DC attended Valley View he has not progressed above the bottom behavior group.³ The hearing officer then concluded that

behavior and loss of privileges to punish inappropriate behavior. R 243-248.

³ To support these findings, the hearing officer appears to place great weight on the testimony of Dr. Robert Ciottone, a clinical psychologist. Dr. Ciottone has an adjunct relationship with Valley View and at the time of the hearing he met with eleven students, including DC, from the school. R 255. Dr. Ciottonne meets with each student for fifty minutes a week. At the hearing Dr. Ciottone testified that:

since a “24/7” environment has not helped DC, a behavior plan that provided less than “24/7” care is unlikely to be successful. The hearing officer held that until Plaintiff provided DC a highly controlled “24/7” appropriate program it must pay for his continued placement at Valley View. R 260.

Standard of Review

The IDEA provides that when reviewing the determination by a hearing officer 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 First Circuit has interpreted this language as requiring scrutiny 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). To add a measure of structure to the ambiguity inherent in the First Circuit’s description, this Court has in the past followed a three-step approach when reviewing a hearing officer’s determination:

First, the Court carefully reviews the entire record of the due process hearing.
Second, appropriate deference is given the Hearing Officer and [her]expertise,

His [DC’s] behavior is characterized by almost constant motion, distractibility, attentional drift, rigidity of focus once established, and impulsivity, both of a verbal nature and in terms of action. As a result, he has only a tentative and often fleeting sense of the relationship between his own actions and the consequences that ensue . . . [DC’s] difficulties require pharmacological treatment, psychotherapy and a very specialized milieu, one that ties actions to both positive and negative consequences in a very concrete way and in all aspects of his ongoing experience.

R 255. Dr. Ciotonne testified further that Valley View is a supportive environment and that DC was not ready for a less structured environment. *Id.*

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).

Due process hearing

A. The IDEA

Congress enacted the IDEA to provide federal funds to educate handicapped children subject to the states instituting certain goals and procedures. *Lenn v. Portland School Committee*, No. CIV. 92-0011-P-H, 1992 WL 510892 at *2 (Dec. 14, 1992). To qualify for the funds the states must offer all children a “free appropriate public education” in the least restrictive educational environment. 20 U.S.C. §§ 1412(2)(B), (5)(B).⁴ The “free appropriate public education” should “emphasize special education and related services designed to meet their unique needs and prepare them for employment and independent living. . . .” 20 U.S.C. § 1400(d)(1).

The primary tool behind implementing a “free appropriate public education” under the IDEA is the student’s individualized education plan (“IEP”). 20 U.S.C. §1414. The IEP is developed by a team of persons most familiar with the student’s needs including the student’s teachers and parents. *Greenbush*, 949 F. Supp. at 938. “The ultimate question for a court under the Act is whether a proposed IEP is adequate and appropriate for a particular child at a given

⁴ The “least restrictive educational environment” language in the IDEA is often referred to as mainstreaming preference. See *Roland M.*, 910 F.2d at 992-93 (“Mainstreaming may not be ignored, even to fulfill substantive educational criteria.”)

point in time.” *Burlington II*, 736 F.2d at 788. In Maine, the team that develops the IEP is called the Pupil Evaluation Team (“PET”). *Id.*

When analyzing whether a local school unit violated the IDEA a Court must apply the following two-prong standard

First, has the State complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act’s procedures reasonably calculated to enable the child to receive education benefit?

Hendrick Hudson Central School Dist. v. Rowley, 458 U.S. 176, 185-86 (1982). Here, the sole issue is whether the substance of DC’s 1999-2000 IEP provides DC with an educational benefit.

B. Discussion

The IDEA does not require that a student receive an education that maximizes the student’s potential. *Rowley*, 458 U.S. at 197-198. As the First Circuit explained:

The Act sets more modest goals: it emphasizes an appropriate, rather than an ideal, education; it requires an adequate, rather than an optimal, IEP. Appropriateness and adequacy are terms of moderation. It follows that, although an IEP must afford some educational benefit to the handicapped child, the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child’s potential.

Lenn v. Portland School Committee, 998 F.2d 1083, 1086 (1st Cir. 1993).

To conform to the provisions of the IDEA the IEP must be reasonably calculated to provide the student with an educational benefit. *Greenbush*, 949 F. Supp. at 939. In analyzing whether the IEP violates the IDEA the hearing officer should scrutinize a child’s IEP. *Id.* at 248.

Here, unlike *Rome I*, the hearing officer clearly set forth her opinion as to why DC’s 1999-2000 IEP was insufficient. Her holding can be summed up by one sentence in her opinion, “This hearing officer believes that the student’s out-of-school behavior does need to be addressed

in the student's educational plan in order for the student to receive benefit." R 259. It is on the basis of that belief that the hearing officer ordered Plaintiff to fully fund DC's education at Valley View.

It is important to remember how great a student's needs must be before residential placement is deemed appropriate. The First Circuit explained:

It follows from *Rowley* that the Act does not authorize residential care merely to enhance an otherwise sufficient day program. A handicapped child who would make educational progress in a day program would not be entitled to placement in a residential school merely because the latter would more nearly enable the child to reach his or her full potential. A school committee is required by the Act merely to ensure that the child be placed in a program that provides opportunity *for some educational progress*.

Abrahamson v. Hershman, 701 F.2d 223, 227 (1st Cir. 1983) (italics added).

This Court, in *Ciresoli v. M.S.A.D. No. 22*, 901 F. Supp. 378 (D. Me. 1995), was faced with a student diagnosed with Childhood Psychotic Disorder and who exhibited assaultive behavior similar to DC. The Court stated that:

The Court recognizes that Joshua's behavior, particularly outside the structure of his school programming, is often unpredictable and sometimes dangerous. This, by itself, is not enough to compel a residential placement under the IDEA, as long as the student is receiving an educational benefit from his placement. (citations omitted). The result would likely be different if the Court found that Joshua's "behavior eventually reached a point at which he was uncontrollable both in and outside of school, rendering him uneducable without extensive psychological treatment."

Ciresoli, 901 F. Supp. at 386-87 (quoting *Manchester Sch. Dist. v. Charles M. F.*, Civ. No. 92-609-M, 1994 U.S. Dist. LEXIS 12919 (D. N.H. Aug 31, 1994)).

As stated in *Rome I*, there is no evidence that DC's behavior reached a point where he was uncontrollable *both* in and out of school, rendering him uneducable. To support her decision that DC is in need of "24/7" care the hearing officer points out that "[l]ike the child in

Abrahamson, this student presents a unique case.” R 260. While it is true that in *Abrahamson*, the First Circuit upheld the district court’s decision to residentially place the student, that student posed far greater challenges than DC. The district court found that:

Daniel has the mentality of a one- to four-year old, cannot dress, eat, go to the bathroom or otherwise care for himself unaided, and except for uttering one or two sounds, which he probably does not understand, cannot speak. He sometimes responds to simple commands like "stop," "wait," "sit down," and "stand up," but his responses are erratic and unpredictable. He does not recognize danger to himself and may step in front of traffic, move through open windows, or be burned while investigating a stove. He exhibits compulsive running behavior, although this has somewhat diminished recently.

Abrahamson, 701 F.2d at 224. Daniel’s situation is so far removed from the challenges faced by DC as to make any comparison between the two unpersuasive.

Upon reviewing the 1999-2000 IEP and accompanying record, I am satisfied that while the IEP might not maximize DC’s potential, it would provide DC some educational benefit.

Abrahamson v. Hershman, 701 F.2d at 227. As discussed previously, the plan is detailed and Dr. Moran has implemented the plan in the past with great success. *See* discussion *supra* pp. 3-4 (detailing aspects of the plan). Dr. Moran testified that he has applied the plan designed for DC with fifty to sixty other students. Although he conceded there were times when the plan did not work, it did work about ninety-eight percent of the time. *Dr. Moran* at 315. Based on my review of the record, I am satisfied that DC’s 1999-2000 IEP was reasonably calculated to provide educational benefit to DC in the least restrictive environment. Accordingly, I recommend that the Court REVERSE the hearing officer’s decision.

C. Reimbursement

Having determined that the 1998-1999 IEP is adequate the Court must next determine whether Defendant must reimburse Plaintiff for the tuition it paid for DC to attend Valley View during that school year. Plaintiff's ability to obtain reimbursement is limited. *Town of Burlington v. Department of Education for the Commonwealth of Mass.*, 736 F.2d 773, 800-01 (1st Cir. 1984) ("We hold, therefore, that where the final state administrative decision rules a town's proposed IEP inappropriate and orders the town to fund placement, and the parents have complied with and implemented that decision, a town or local educational agency is estopped from obtaining reimbursement for the time period, usually one year, covered by the state agency decision and order.") Accordingly, Rome is not entitled to reimbursement because Mrs. B complied with and implemented the hearing officer's determination that DC be permitted to attend Valley View.⁵

Conclusion

For reasons stated above, I recommend that the Court REVERSE the hearing officer's decision.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

⁵ Plaintiff points to a recent case that opens up the possibility that a parent may, in some instances, be ordered to reimburse the school district if the IEP and placement proposed by the district is later deemed appropriate. *Verhoven v. Brunswick School Committee*, No. 98-2348, 1999 WL 721698, slip. op. at *11 n.1 (Sept. 21, 1999). The Court is satisfied that based on the facts in this case, it would be inequitable to order Defendant to reimburse the town for complying and acting within the strictures of the hearing officer's decision.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Margaret J. Kravchuk
United States Magistrate Judge

Dated on March 8, 2000.

ADMIN

U.S. District Court
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 99-CV-198

ROME SCHOOL COMMITTEE v. B, MRS
Assigned to: JUDGE MORTON A. BRODY
Demand: \$0,000
Lead Docket: None
Dkt# in other court: None

Filed: 08/19/99
Nature of Suit: 440
Jurisdiction: Federal Question

Cause: 20:1400 Civil Rights of Handicapped Child

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