

NOTICE OF REVIEW OFFICER'S DECISION

CHILD'S NAME:

PARENT'S NAME & ADDRESS:

SCHOOL DISTRICT:

USD #

KS

DISTRICT'S COUNSEL:

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REVIEW OFFICER:

Kathleen Neff
601 Maple
Overbrook, KS 66524

DATE:

March 17, 2011

BEFORE THE REVIEW OFFICER

**In the Due Process Hearing of
and USD #
, Kansas**

STATEMENT OF FACTS

Student is autistic and epileptic, and has had an IEP for years, which provided accommodation and support for him in the regular education classroom and curriculum. During the 2009-2010 school year, his 4th grade year, it became apparent that Student was falling well behind his peers academically. (District's Exhibit 5) Student's behavior at school also became progressively worse until he was uncontrollable. Student was consistently physically aggressive and disruptively noncompliant throughout the school day. (District's Exhibit 12 & 38.)

A three-year re-evaluation of Student was done at the end of the school year, and his academic weakness and behavioral problems were confirmed. (District's Exhibit 14.) The District then proposed a new IEP with a change of placement from the regular classroom to a self-contained classroom. (District's Exhibit 15.) Parents refused consent to the proposed IEP and change of placement. A number of IEP meetings were held, but Parents continued to refuse consent to the proposed change of placement. (District's Exhibits 20, 26, 27, and 39.) Student's behavior continued to greatly interfere with his educational progress, as clearly shown by careful data collection. (District's Exhibits 36, 37 and 38.)

On November 5, 2010, the District filed Notice to Parents of Special Education Due

Process Hearing, seeking approval of the September 22, 2010 proposed IEP with its change of placement to a self-contained classroom. Due Process hearing was held January 18 & 19, 2011. The Parents appeared pro se and presented no evidence, but were present and did participate in the hearing. The District presented five witnesses and forty-seven exhibits, and rested. The Hearing Officer found for the District on all questions presented.

PROCEDURAL HISTORY

The District initiated due process procedures in this matter, filing its notice November 5, 2010. The Hearing Officer was appointed and Pretrial Conference was held December 1, 2010, in which Hearing was set for January 18 thru 21, 2010. On December 3, 2010, the due date for the Hearing Officer's decision was extended to January 31, 2010.

In teleconference January 6, 2011, Parents' Motion to Dismiss and Motion for Continuance were taken up for consideration. The District opposed both motions, and each was denied. January 11, 2010, Parents' counsel was granted permission to withdraw. The next day Parents filed, pro se, a Motion to Dismiss and a Renewed Motion for Continuance. The District opposed both motions. After consideration, the Hearing Officer denied both motions and ordered the Hearing to proceed as scheduled.

The review officer was appointed February 23, 2011. The procedural due process requirements for hearing on matters of special education are set forth in 34 CFR 300.508 and K.S.A. 72-973 & 72-973a. A review of the foregoing procedural history of this case shows that all rights guaranteed by law were afforded both parties. (District's Exhibits 2, 5, 6, 7, 8, 9, 14, 15, 16, 18, 20, 22, 26, 28, 29, 35 and 39.)

The review officer has thoroughly read and reviewed: the hearing transcript, the exhibits, the Due Process Complaint, and the Hearing Officer's Decision.

In light of the overwhelming weight of the evidence presented, this Review Officer

determined no further evidence was needed. For the same reasons, no oral or written argument seemed helpful, either, and were not requested.

ISSUES & HOLDINGS.

I. Issues at Hearing

A. Whether The 9/22/10 IEP Is Reasonable Calculated to Enable Student to Receive Some Educational Benefit as Required Under IDEA, and Should Be Implemented.

RULING: Affirmed.

B. Whether The District's Proposed Placement in a Self-Contained Classroom Is the Least Restrictive Environment in Which Student's IEP Can Be Implemented Successfully.

RULING: Affirmed.

AUTHORITIES & RATIONALE

1. "The Act's requirement of a "free appropriate public education" is satisfied when the State provides personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate grade levels used in the State's regular education, and must comport with the child's IEP, as formulated in accordance with the Act's requirements." Hendrick Hudson District Board of Education v Rowley, 458 U.S. 176, at 177, Syl. 1, 1982.

2. "In suits brought under the Act's judicial-review provisions, a court must first determine whether the State has complied with the statutory procedures, and must then determine whether the individualized program developed through such procedures is reasonably calculated to enable the child to receive educational benefits. If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more." Id., at

177, Syl. 2.

3. 34 CFR 300.114--LRE Requirements, (a)(2) “Each public agency must ensure that—

(1) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and

(ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”

4. 34 CFR 300.324, (a)(2) Consideration of special factors. “The IEP team must—

(i) In the case of a child whose behavior impedes the child’s learning or that of others, consider the use of positive behavioral interventions and support, and other strategies, to address that behavior.”

Student’s 4th grade IEP included a Behavioral Intervention Plan. (District’s Exhibit 1) Despite this attempt to address Student’s behavior, his conduct continued to worsen, and the record and exhibits are replete with confirming data on this point. On a daily basis, he went to the floor, yelled, kicked, hit, pinched, slapped, threw things, flipped the classroom lights on and off, on and off, and ran out of the room and, if possible, the building, all while class was in session. The periods of noncompliance were averaging an hour per day by November, 2010. (District’s Exhibit 37)

A cursory review of his 4th grade IEP, the 6/7/10 proposed IEP, and the 9/22/10 IEP approved by the Hearing Officer clearly shows Student was not working at a 5th grade level in any subject, and lacked the most essential social skills. Yet the child was expected to spend his days in a regular classroom, listening to lessons he could not follow, and being continuously presented with work he could not do, on subjects he did not understand. Nor is the regular ed class going to wait for him—there is a full classroom of nondisabled children there, and they are

going to move on, leaving Student ever further behind, ever more lost. Of course he's misbehaving.

The parents requested an outside observer, and Ms. Lee Stickle came to the school and watched Student. Her report (District's Exhibit 47) nailed the problem: "Student's refusal to respond or to complete assignments is an indication of frustration...he has learned using a very powerful tool, chaining; he has chained an intricate pattern of aberrant behavior...In conclusion, Student is a young man that is not happy." Indeed.

The District changed personnel in an effort to maintain Student in the regular ed classroom, even assigning a Resource Room teacher to work with him alone, instead of the usual para. (T, V. 1, pp 209 – 211) It did not help, because the environment cannot be sufficiently modified to meet this child's needs.

During Student's ESY summer school, however, there was a great improvement in his behavior and his learning. Student's ESY was done in the self-contained behavioral classroom, where he had the benefit of one-on-one instruction, staff members specifically trained for his needs, very small class size, and a schedule that could be adjusted to his rate of learning. (District's Exhibit 17, T, V. 1, pp. 74 – 82). He was even able to successfully ride the bus to and from school. He was finally in an instructional setting geared to his needs, where he could learn.

RULING

The Hearing Officer's Decision is grounded on overwhelming evidence that Student can no longer learn in a regular education classroom, nor can such a classroom be modified to address the young man's needs. In short, a regular education classroom can no longer provide Student with a FAPE. The 9/22/10 IEP does address Student's educational needs, within the intent of the statute. Student's "removal ... from the regular educational environment occurs

only because the nature or severity of his disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” The change of placement necessitated by Student’s particular needs is one in which he has already proven successful, and it is appropriate. The 9/22/10 IEP is reasonably calculated to provide Student FAPE.

This is the Review Officer’s Ruling and Order.

Review Officer

CERTIFICATION OF SERVICE

I certify that on March 17, 2011, the foregoing Review Officer’s Decision was sent by email and then by registered mail, return receipt requested, to:

, KS 66216

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Mark Ward
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Kathleen Neff

RIGHT TO APPEAL

The parties are hereby notified that an appeal from this decision is begun by filing a Petition for Judicial Review as set out in the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions (K.S.A. 77-601 et. seq.) within 30 days of this Decision on

Review. The petition must be filed in the District Court of the county in which the Decision is entered or is effective. Failure to file the petition on time may be jurisdictional and fatal to any further appeal.