

**BEFORE THE KANSAS
STATE DEPARTMENT OF EDUCATION**

In the Matter of:

KSDE Case No. 18DP____-002
OAH Case No. 19ED_____

THE SPECIAL EDUCATION DUE PROCESS
HEARING FOR C.S., by and through his Legal
Guardians and next of friends, K.P. & C.S.
and USD ____
and _____ Kansas Cooperative in Education.

REVIEW DECISION

(Pursuant to K.S.A. 72-3418)

Statement of Case

The above-captioned matter was referred to the undersigned Administrative Law Judge by the Kansas State Department of Education as authorized by K.S.A. 72-3418 and K.S.A. 75-37,121(d).

Procedural Matters

1. On February 20, 2018 the District filed a Notice to the Parents of C.S., a request for Due Process Hearing. This case was designated 18DP____-001 and was subsequently resolved by the parties wherein the parties agreed that C.S. would be reevaluated and the District would be allowed to have contact with C.S.'s medical doctors.
2. The parents of C.S. filed a counter Notice of Parents' Counter Request for Special Education Due Process Hearing on March 2, 2018. This matter was not resolved between the parties and went to hearing before a local hearing officer, James G. Beasley, on October 22, 23, 24, and 25, 2018; and December 10, 11, 12, and 13, 2018, at the Administrative Center of U.S.D. ____ in ____, Kansas. Ms P. and Mr. S., on behalf of C.S., were represented by Peter John Orsi, II. USD ____ and the _____ Kansas Cooperative in Education (District) were represented by Sarah J. Loquist. Six witness were called by Ms P. and Mr. S. (Parents) and 10 witnesses were called by the District.
3. On October 1, 2018, a Motion in Limine was filed by the District seeking to limit the scope of the issues in this matter to the 2016-2017 and 2017-2018 school years. The Hearing Officer ruled that events that occurred prior to the two year limitation could be offered for historical background, but the scope of the issues to be determined by the Hearing Officer was limited to the past two years. K.S.A. 72-3415(a)(1)(A) & (b)(1).

4. The Parents bear the burden of proof and presented their case first. K.S.A. 72-3416(b). They must show by a preponderance of the evidence that District failed to provide C.S. with an Individual Educational Plan (IEP) that was reasonably calculated to enable him to make progress. 34 C.F.R§300.516(c)(3). A preponderance of the evidence is evidence which shows that the truth of the facts asserted is more probable than not. *In re B.D.-Y* 286 Kan. 686, 187 P.3d 594 (2008).
5. At the conclusion of the evidence, the parties submitted Proposed Findings of Fact and Conclusions of Law. The Hearing Officer's Decision was issued May 21, 2019. On June 21, 2019 the Parents filed a Written Notice of Appeal of the May 21, 2019 Due Process Hearing Decision.

Scope of Review Officer's Review

1. In compliance with K.S.A. 72-3418 (b)(1)(a), the review officer shall: (A) examine the record of the hearing; (B) determine whether the procedures at the hearing were in accordance with the requirements of due process; (C) at the discretion of the review officer, allow the opportunity for oral or written argument, or both; (D) seek additional evidence if necessary; (E) render an independent decision; and (F) send the decision on any such appeal to the parties and the state board.
2. Due process requires that a person be afforded a right to be heard in a meaningful way. It includes notification to an individual of the intended action and a meaningful time and in a meaningful manner. *Taylor v. Kansas Dept of Health and Environment*, 49 Kan App.2d 240, 305 P.3d 729 (2013) and *In re Marriage of Friars and Brunch*, 2014 WL 113461, at*2 (Kan. C. App. Jan. 10, 2014).
3. Specific due process requirements of the Board are found at K.S.A. 72-3416(b). They are as follows:
 - (1) The right of the parties to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;
 - (2) the right of the parties to be present at the hearing;
 - (3) the right of the parties to confront and cross-examine witnesses who appear in person at the hearing, either voluntarily or as a result of the issuance of a subpoena;
 - (4) the right of the parties to present witnesses in person or their testimony by affidavit, including expert medical, psychological or educational testimony;

(5) the right of the parties to prohibit the presentation of any evidence at the hearing which has not been disclosed to the opposite party at least five days prior to the hearing, including any evaluations completed by that date and any recommendations based on such evaluations;

(6) the right to prohibit the other party from raising, at the due process hearing, any issue that was not raised in the due process complaint notice or in a prehearing conference held prior to the hearing;

(7) the right of the parties to have a written or, at the option of the parent, an electronic, verbatim record of the hearing; and

(8) the right to a written or, at the option of the parent, an electronic decision, including findings of facts and conclusions.

Conclusions of Law

1. The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq.* establishes a right to a free appropriate public education (FAPE) for children with disabilities.
2. A FAPE requires that an Individual Educational Plan (IEP) be reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. This requires a prospective judgment by the school officials. *Andrew F v. Douglas County School District*, 137 S. Ct. 988, 117 LRP 9767 (S.C. 2017).
3. Deference is given to school officials. However, they must be able to provide a cogent and responsive explanation for IEP decisions that show it is reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances. *Id.*
4. It is the function of the administrative hearing body [hearing officer] to determine the weight or credibility of the testimony of witnesses. *Lacy v. Kansas Dental Board*, 274 Kan. 1031, 1047-1048, (2002) citing *Swezey v. State Department of Social & Rehabilitation Services*, 1 Kan. App. 2d 94, 562 P.2d 117(1977).
5. Substantial evidence possesses both relevance and substance and furnishes a substantial basis of fact from which issues can reasonably be resolved. *Cresto v. Cresto*, 302 Kan. 820, 358 P.3d 831 (2015). Substantial evidence has long been accepted to be evidence that a reasonable person might accept as being sufficient to support a conclusion. *Board of Cty. Comm. Of Ct. of Cherokee v. Kansas Racing and Gaming Comm.* 306 Kan,298, 326, 393 P.3d601 (2017).

Identified Issues

1. Did the District provide C.S. with a Free Appropriate Public Education (FAPE) during the 2016-2017 and 2017-2018 school years?
2. If FAPE was not provided, what is the appropriate remedy? The Parents are requesting compensatory services and an out-of-district, residential school placement that can provide intensive residential teachers and therapists.

Background Summary

1. On August 19, 2005, when C.S. was age 4 years 7 days, he was diagnosed to be on the autism spectrum by C.D. Johnson, M.D., at the University of Kansas Medical Center. C.S. was noted to be difficult to direct and used limited speech.
2. Autism is not a stagnate condition and it is possible that it can improve over time or become worse over time. Dr. Blue believed C. S.'s condition had become more severe. (Tran., Vol 2, at 42, ln 10-43.)
3. In the fall of 2016, C.S. was diagnosed with rheumatic fever and rheumatic encephalitis and Sydeham's chorea (a movement disorder). During this time, C.S. was also diagnosed with obsessive-compulsive disorder (OCD) and a tic disorder.
3. In the summer of 2018, C.S. was diagnosed with autoimmune encephalitis.
4. C.S. has demonstrated escalating behaviors since his illnesses. He has attacked both of his parents, (Tran., Vol 1, at 95, 102 ln 14-24.) he had to be restrained in a Posey bed while hospitalized and he was given chemical restraints. (Tran. Vol.2, at 11, ln. 14-13, ln. 8.) He has made multiple attacks on teachers and staff. (Tran., Vol I at 93.)
5. C.S. was placed in a self-contained class room and is assigned a teacher and two paraprofessionals. However, he eats lunch with other students and is in a regular classroom for physical education, and music and movement. (Tran., Vol. 1, at 93, Tran., Vol. 2 at 160., Tran., Vol. 1 at 92.)
6. At a January 2017 IEP meeting, the Parents requested placement for C.S. at Heartspring, a private residential program in Wichita, Kansas. Reasons identified for wanting C.S. at Heartspring included that it has medical personnel there 24 hours a day, and it would provide a consistent environment for C.S. There is testimony that C.S. struggles with adjusting between the different environments from school and between his parents homes. (Tran., Vol. 7 at 15, ln 15-24.)
7. Mr. S. decided to pursue placement at Heartspring primarily due to behavioral changes C.S. was having at home. (Tr., Vol 3 at 192, ln .22-193, ln. 4)

8. Ms P. made a social media post which states, in part, " ... his father and I are in the process of accomplishing for him, to get him into the best private school & all the opportunities he deserves... [t]his is a story of parents relentless in their pursuit to advocate for & provide their child the very best. .. " District Ex. BBB.

Review Officer's Findings

1. The assigned review officer is impartial and independent from the Board, the District, or C.S. and his guardians.
2. The review officer has examined the record of the hearing.
3. Due process has been afforded C.S. in compliance with K.S.A. 72-3416(b).
4. It is the burden of the Parents to show by a preponderance of the evidence that C.S. has not been provided a FAPE.
5. Credibility and weight determinations are the function of the hearing officer. In this case there were eight days of testimony and the hearing officer is the individual who personally observed the witnesses. The hearing officer made specific findings as to credibility. These credibility determinations are not subject to review and are determined.
6. The testimony of the District's witnesses was found to be credible. Within the testimony there is substantial evidence that C.S. has made progress in communication and language in the 2017-2018 school year. There is substantial evidence that at the time the IEPs were developed, they were appropriately ambitious as to enable C.S. to make progress appropriate in light of his circumstances and are reasonably calculated to provide a FAPE. The requirements of *Endrew* were met by the District.
7. The hearing officer noted several times the Parent's testimony was shown to be uninformed or incorrect. For instance, Mr. S. was unaware that C.S. attends regular class rooms for physical education, music and movement. Ms P. testified that C.S. did not have an iPad for communication. The iPad was requested January 2017 and she testified that C.S. did not receive it until May 2017. However, C.S. actually had the iPad by February 1, 2017. Ms P. testified there were no material changes in C.S.'s IEP between January 2017 and November 2017. However, there was an amendment in the IEP signed by C.S.'s father on January 25, 2017 and another amendment signed by both parents on November 10, 2017. Finally, with regard to the Request for Due Process filed by the District relating to the District being able to communicate with C.S.'s medical providers, Ms P.'s position was that the Medicaid release allowed the District to communicate with C.S.'s medical providers. After a review of the document it was clear it did not.
8. There is also substantial evidence that C.S.'s behavioral issues can be linked to his medical issues. In an effort to adequately address this issue the District requested permission to conduct a behavioral functional analysis (BFA) and be permitted to interact with C.S.'s medical providers but this was met with roadblocks by the Parents. When

preventing the District from completing assessments, the Parents cannot now claim the District has failed to make an adequate assessment.

9. Further, the Parents argue that C.S.'s behavior can only be controlled at Heartspring. However, because of the road blocks placed by the Parents, the District was not able to address this issue and make a determination whether it can provide C.S.'s a FAPE in light of his behavioral and medical needs. The hearing made a specific finding that the Parents cannot deny consent for a BFA and then claim the District failed to provide FAPE.
10. The hearing officer declined to address every "sub-issue" raised by the Parents. His position was that they were not ignored, but considered and weighed in his decision but did not require separate analysis. This does not conflict with the due process requirements of K.S.A. 72-3416(b).
11. The issue is not whether the district must "get him [C.S.] into the best private school" and provide him the "very best." But whether a FAPE was provided to C.S. during the 2016-2017 and 2017-2018 school years. There is substantial evidence in the record to support the hearing officer's decision that the Parents have failed to show by a preponderance of the evidence that C.S. has not been afforded FAPE during the 2016-2017 and 2017-2018 school years. The hearing officer also found that the services the Parents are seeking from Heartspring go beyond what is necessary for the District to provide a FAPE.

Conclusion

The hearing officer's Decision of May 21, 2019 is affirmed.

Appeal Rights and Other Administrative Relief

Pursuant to K.S.A. 72-3418, this decision is subject to review in accordance with the Kansas Judicial Review Act or to an action in federal court as allowed by the federal law. Consistent with state court actions, any action in federal court shall be filed within 30 days after service of the review of the officer's decision.

Sandra li:-
Administrative Law Judge/Presiding Officer
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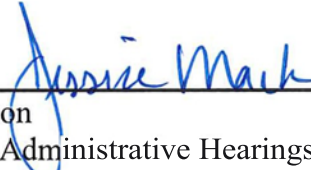
CERTIFICATE OF SERVICE

On **JLI** **ID**, 2019, I mailed a copy of this document postage prepaid to:

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