

BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION

IN THE MATTER OF:)
)
METROPOLITAN NASHVILLE PUBLIC)
SCHOOL SYSTEM)
)
) Cause No.: 07-04
v.)
) Michael E. Spitzer
) Administrative Law Judge
B.C.)

ORDER

I. PROCEDURAL FACTS AND HISTORY

B.C. is a ten year old student enrolled in a Moderate Intervention Program-Fragile (MIP-F) within the Metropolitan Nashville Public School System.(Ex 1.207-222). B.C. was identified for IDEA services as Developmentally Delayed on January 27, 2003.(Ex. 1,pp 305-323). Subsequently (3 years later) in January of 2006 the IEP team conducted a re-evaluation and discussed the need for further cognitive testing. At that time the team concurred that further testing was not necessary and further deemed B.C. eligible for special education and related services pursuant to an identification of Speech Impairment and Language Impairment. (Ex. 1 pp. 324-327).

When the 2006-2007 school year resumed, B.C. was placed in a new classroom, met with a new speech/language pathologist, new occupational therapist, new resource teacher and the system withdrew the full-time educational assistant from B.C.'s program. Whether or not related to the change in "environment". B.C. began to have behavioral concerns and his past rate of progress slowed. Principal Steve Breese noticed that B.C. exhibited new behavioral concerns that affected his program and were becoming disruptive to the school environment. In spite of this, however, Principal Breese testified that he was aware that B.C. was still making progress under his then existing, IEP.

Due to the changes noted in B.C.'s response to the new school year, there were numerous IEP meetings. At these meetings, the parents and teachers developed an agreed upon IEP and B.C., again, began to show progress in meeting his goals. At one of these meetings (September 2006) it was determined that B.C. would be placed in the MIP-F

classroom with Ms. Denny and then subsequently in January of 2007 B.C. was moved again to Mr. Staubitz MIP-F classroom. While these changes disrupted B.C.'s academic stability and progress to some extent, B.C. continued to make progress even though goals and objectives were not fully met.

The parents attribute the lack of significant progress to the system's withdrawal, in late 2006, of the full time educational assistant who had worked with B.C. prior to that time. The full time assistant was not re-instated over the parent's objection.

II. ISSUE

Whether or not the petitioner, Metropolitan Nashville Public School System is entitled to conduct additional evaluations of a student over the objections of the parents

(B.C. was initially evaluated and then re-evaluated in three(3) years. He is currently working under an approved IEP. The school system believes that it is their duty to further evaluate B.C. in order to determine his strengths and weaknesses, cognitively and to assist in determining exactly what B.C. can do rather than what he wants to accomplish. The parents feel that the request by the school system is a pretext and unnecessary. The parents ground their concern in the fact that a school psychologist, Beverly Whalen-Schmeller, was asked by the system to visit a "life skills class" after her involvement with B.C. Further the parent's state that they are satisfied with the IEP developed for B.C and he is progressing under the present plan. Finally, almost every witness who testified at this hearing stated that they believe B.C. also meets the criteria for a mentally retarded designation as well as speech/language.)

III. DISCUSSION

A. Legal Basis for Review:

The purpose of the Individuals with Disability Education Act is to guarantee that children with disabilities have access to a free appropriate public education. 20 U.S.C. 1400 (d)(1)(a). Pursuant to the parameters of IDEA, a school system is required to, in effect, find those children who are in need and provide a system whereby all such children can be identified and have their special needs met. (34 C.F.R. 300.111)

Under the system, as mandated by Congress, the school system is required to conduct an initial evaluation to determine if a child qualifies for services and, if so, develop an individualized educational program (IEP) for that child. 20 U.S.C. 1414 (d)(1)(A). Evaluations are not solely the responsibility of psychologist and medical practitioners, but are to include a team of educational professionals made up of teachers, special education advisors, administrators, the parent(s) and any other person "with special expertise" 20 U.S.C. 1414(d)(1)(B).

The goal or objective of the initial evaluation and subsequent evaluations is to assist in the creation of an Individualized Educational Plan which is best suited to meet the special needs of the child evaluated. The IEP must include (1) statements of the child's present level of educational performance, (2) measurable annual goals, and (3) the special education and related services as well as supplementary aids and services that will be provided to the child. 20 U.S.C. 1414(d)(1)(A).

In the present case, neither party raised, either at the hearing or in the pre-trial statements, any issue related to procedural violations. The sole issue raised was whether or not the school system could, via a due process hearing, override the parents refusal to allow additional cognitive testing for their child.

Therefore, this Administrative Law Judge turns to the question of whether or not the IEP for B.C. is reasonably calculated to enable B.C. to receive educational benefits. Board of Educ. Of Hendrick Hudson Cent. Scho. Dist. v. Rowley, 458 U.S. 176, 206, 102 S.Ct. 3034, 73 L.Ed2d 690 (1982). Metropolitan Nashville School System filed the request for hearing and clearly they have the burden by proving by a preponderance of the evidence that the IEP devised by it's own professionals and the parents is inappropriate. McLaughlin v. Holt Public Shcools Board of Education 2003 WL 397586 (6th Cir.(Mich))

In the present case, it is apparent that B.C. has parents who are involved and want to participate with the school system to develop an appropriate educational plan. Parents and school personnel working together have gotten over the bumpy waters of a change from grade to grade, teacher to teacher and even a somewhat drastic revision in the program. As late as September 2006, the IEP team concluded that the previous disability for B.C. continued to exist and B.C. needed special education services. Further, and more important, the team concluded that the present or proposed educational program and related services were appropriate to meet the student's stated annual goals. (Ex. 14) Everyone agreed that while goals were not entirely met, B.C. was making progress.

This Administrative Law Judge heard testimony from almost each witness and reviewed the various IEP's., and from all of which, it is apparent that B.C. has the ability to learn and that he is making progress.

A. Testimony this Administrative Law Judge feels is significant:

1. Mr. Breese the school principal: While Mr. Breese, the principal, states that he would like to have some cognitive testing to determine B.C.'s strengths, he also signed off on the IEP at each level, basically agreeing that the present plan was appropriate. (Exhibit 17). However, Mr. Breese went further to say that B.C. was not meeting his goals (only 80% mastery) and the system would like to know if B.C. is simply not capable of meeting these goals. Mr. Breese feels this can only be determined from a cognitive test.

2. John Staubitz the classroom teacher: B.C.'s present teacher, John Staubitz found that B.C. exhibited inconsistent behaviors and believes that he may be guessing at some of his answers. Mr Staubitz would like to have a cognitive test to determine the present level of functioning of B.C. Mr. Staubitz believes test results will tell him if B.C. can do better or if his failures are based on his lack of effort. (Tr. p.258). However, Mr. Staubitz openly admits that when there is consistency in the academic environment, B.C. does make progress. (Exhibit 30)

3. Dr. Whalen-Smeller the school psychologist: Dr. Beverly Whalen-Smeller, a licensed school psychologist testified that B.C. had significantly low scores on prior tests and surmised that there were cognitive deficits that should be identified. (Tr. p. 365-367). On cross examination, Dr. Whalen-Smeller was asked about the reliability of cognitive tests with Down's Syndrome children, such as B.C., and she genuinely stated that she didn't know, she would just be seeking meaningful information---a range of reasonable expectations for learning. Dr. Whalen-Smeller further stated that she had only spent 2-3 hours with B.C. to the point of the hearing.

4. Caresa Young a licensed school psychologist working with B.C. : Caresa Young (c.v. at exh 32), a licensed school psychologist who teaches at Vanderbilt University testified that she started working with B.C. in January of 2005. Not unlike school personnel, Ms. Young stated that she sees progress in B.C. She further stated that while cognitive testing might provide additional information, it is not a substitute for intervention and test results with a student such as B.C. are very unreliable. Ms. Young further opined that B.C. was working at a very minimal level (late Kindergarten – early 1st grade) and that he would meet the criteria for mental retarded.

5. Lori Crump, first grade teacher of B.C.: Ms.Crump testified that she spent 10 months with B.C. She testified that during the 1st grade year, B.C. was assigned a full time educational assistant and that was very helpful. Ms. Crump indicated that

cognitive testing was discussed at some points during the year but it was evident to Ms. Crump that B.C. didn't need any further testing. Ms. Crump felt that the IEP which had been developed was appropriate and he was making progress. This teacher further indicated that when the system indicated that the educational assistant was going to be cut back to half time she expressed grave concerns about B.C.'s continued educational progress. Ms. Crump states that she believes B.C. can learn. She further stated that if she knew B.C.'s IQ she might change her expectations. She implied, at the very least, that while her expectations might change, her methodology with B. C. would remain the same.

6. Ashley Strobel a kindergarten teacher with master's level special education certification: Mrs. Strobel went into B.C.'s room for 30 minutes and at other times B.C. would come to her room. She very emphatically states that she did not think knowing B.C.'s IQ would be of any benefit to her and she further believed that his IEP was appropriate. Ms. Strobel believes that B.C. needs a full time educational assistant and that he was making progress. Concerning testing of B.C., Ms. Strobel believes that his prior test scores are not accurate nor are they useful in working with B.C.

IV. CONCLUSION

This Administrative Law Judge was impressed by the genuine efforts of each witness to paint a truthful picture of B.C. B.C.'s father said that B.C. was a loveable child, affectionate, moody, stubborn at times, loves other people and just when I think I know him, he surprises me with action or words.

Without exception, each witness who testified indicated that B.C. was a student who had been identified for special education services and where progress was limited but visible. Without exception, those who were asked testified that B.C. would most likely or definitely meet the criteria for a mentally retarded designation as well as speech/language impaired. Further each witness testified that B.C. was capable of learning and he learned best when he had a full time educational assistant, his schedule was consistent and he had a structured program. Without exception, all members of the prior IEP teams agreed that the IEP, as developed, was appropriate and met B.C.'s needs. However, in light of this there was concern from the school psychologist and the present teacher that B.C. might need additional goals, and these goals could only be determined by cognitive testing. A cognitive test might, with declarative soundness tell the system that B.C. has such a low IQ that he is, indeed, mentally retarded. If so, the system, as the parents fear, would have sufficient ammunition to make a move from B.C.'s present level of functioning, where he is making progress and into a more stringent environment where he is further classified and goals are further rearranged. In such a case, the parents would be entitled to notice and an opportunity to revisit this matter with a change in placement in question.

Ironically, whether mentally retarded or not, each of the witness agreed that B.C. was making progress and exhibited the ability to learn. The IEP's speak for themselves and fly in the face of the systems desire for additional testing. It appears that those working with B.C. were consistently in agreement that the IEP's which had been developed were not only working but, at least a portion of, the goals and objectives were being met. B.C. was evaluated and identified as a child falling within the parameters for IDEA support and assistance. He has been re-evaluated (after 3 years) and further identified. He continues to make progress in the face of numerous changes in his program and personnel and exhibits the ability to learn.

The systems' desire to test B.C. while potentially suspect is well grounded on their belief that if B.C. is tested there might be some evidence to surface that supports an additional impairment or disability. Certainly a system is required to know, in its best effort, the present level of functioning of each special education student. However, that knowledge may at times be derived more consistently from those professionals working with the student than from even the best testing index. In B.C.'s case, even the school psychologist had concerns that, due to behavioral and attention problems, the test results for B.C. might not be an accurate assessment of his present level of functioning.

This Administrative Law Judge was duly impressed with the professionals in the trenches. teaching, guiding, revisiting continued efforts and willing to spend extensive additional time in IEP meetings to develop an appropriate program for this student, we call B.C. The testimony of the prior teachers was genuine and exhibited a care and concern for B.C. that the Metropolitan School System can boast and be proud of.

Might B.C. qualify for an additional disability if tested? Possibly so, but is that added classification necessary for a free appropriate education for this student? As confirmed in the prior IEP's, the educational professionals who considered and weighed the strength of B.C.'s program thought not.

Unquestionably, IDEA is not intended nor did it create a format for maximizing each identified child's potential. How often have we heard that the concept is not grounded on obtaining a Cadillac but a Chevrolet? Bd. Of Educ. v Rowley, 458 U.S. 176, 198, 102 S.Ct. 3034, 73 L.Ed2d 690 (1982). Is B.C. receiving a benefit from his IEP? Those who teach him and surround him academically state without reserve that he is making progress. He is meeting or approaching some goals and achieving in other areas, based on the testimony and exhibits set forth at the hearing.

As counsel for the parents stated in her post-trial brief in citing J.K. v Fayette County Bd. Of Education 2006 WL 224043:

An IEP is designed to deal with a student's unique needs rather than the definition of the child's disability.....the failure to obtain an official diagnosis does not provide a basis for finding that the LEA violated IDEA.

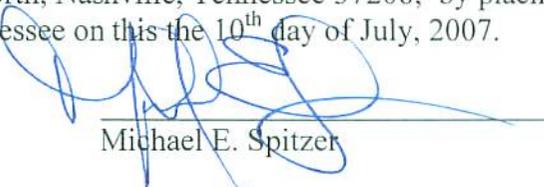
Upon these findings and review of the testimony, the Administrative Law Judge finds that the IEP developed and implemented by the system is appropriate and no further cognitive testing is necessary. The Metropolitan Nashville School System fails to carry its burden of proof in this matter and the parent's refusal to consent is upheld.

Enter this the 10th day of July, 2007.


Michael E. Spitzer, Administrative Law Judge

CERTIFICATE OF SERVICE

I, Michael E. Spitzer, Administrative Law Judge, certify that I have this date served a copy of this Order on Mary E. Johnston, Counsel for the Petitioner, Department of Law, P.O. Box 196300, Nashville, Tennessee 37219, and Holly Ruskin, Counsel for the Respondent, 1308 Eighth Avenue North, Nashville, Tennessee 37208, by placing same in the U.S. Mail at Hohenwald, Tennessee on this the 10th day of July, 2007.


Michael E. Spitzer

NOTICE OF RIGHT TO APPEAL

Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee, or in the Chancery Court in the county in which the petitioner resides or may seek review in the United States District Court for the district in which the school system is located. Such an appeal or review must be sought within sixty(60) days of the date of the entry of the Final Order. In appropriate cases, the reviewing court may order that this Final Order be stayed pending further hearing in the cause.

If a determination of a hearing officer is not fully complied with or implemented, the aggrieved party may enforce it by a proceeding in the Chancery or Circuit Court, under provisions of Section 49-10-601 of the Tennessee Code Annotated.