

BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION

IN THE MATTER OF:

W. A., II, *minor child* and
W.A. and C.A., *parents/guardians,*
Petitioner,

DOCKET NO: 07.03-098722J

v.

Metropolitan Nashville Public Schools,
Respondent.

INITIAL ORDER

This matter came to be heard on June 24-25, 2008, and August 18-20, 2008. The Petitioners, W.A. and his parents, were represented by Mr. Alex Hurder of the Nashville Bar. The Respondent, Metro Nashville Public Schools (Metro) was represented by Ms. Mary Johnston of the Nashville Bar. The matter became ready for consideration on October 10, 2008, when the parties filed their proposed Findings of Fact and Conclusions of Law.

The issues in this case involve whether Metro provided procedural due process to the Petitioners and whether Petitioner was provided with a free appropriate public education (FAPE).

After consideration of the entire record herein and the arguments of counsel, it is determined that Metro has violated IDEA procedures, but that it has, in fact, provided FAPE. It is therefore ORDERED that Petitioner be found the prevailing party with regard to these violations, that an IEP meeting be convened which will adopt the goals set forth in the handwritten IEP of

December (as set forth below) and develop appropriate academic goals and determine appropriate related services. This determination is based on the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

Petitioner's Behavior

1. Petitioner W.A. is a fourteen year old young man with a pervasive developmental disorder. He lives at home with his mother, father, and two younger brothers.¹ He is eligible for special education services, and has been under Individualized Education Plans since kindergarten. During the sixth, seventh, and eighth grades he has been placed at the Developmental Learning Center.

2. W.A.'s pervasive developmental disorder may accurately be viewed as Asperger's Syndrome. While this diagnosis is not appropriately made when there is a diagnosis of mental retardation², as there is in this case, all other elements of this syndrome are present. Dr. William Bernet, Director of Vanderbilt Forensic Services (a program that conducts forensic evaluations of children), evaluated Petitioner W.A. He evaluated him both in a private setting and also observed him while in his classroom at DLC. He also met with W.A.'s father and teacher and reviewed all of W.A.'s prior evaluations. During the evaluation, W.A. exhibited many wild and inappropriate behaviors, including discussing many bizarre sexual behaviors. These behaviors are noted in his report. It is noted, however, that these wildly inappropriate behaviors noted by Dr. Bernet occurred in a setting other than the school setting. His report

¹ Petitioner has been receiving residential treatment under TennCare for the period of the pendency of this case.

² Dr. Bernet questioned whether the Full Scale IQ test was pulled down by extreme weakness in some academic areas. The fixation on particular areas found in Asperger's Syndrome is present here. Petitioner fixates on NBA basketball, R&B and rap music, and sex. It is this last that causes the problem.

makes no mention of behaviors of such magnitude in the school setting³. Dr. Bernet concluded that W.A. is “likely to become dangerous to other individuals-both peers and adults- in the community” and that therefore the least restrictive treatment intervention for W.A. is a residential treatment center. This conclusion is based primarily on Petitioner’s fixation on sexual matters. He appears to confuse thoughts, fantasies, wishes, and actual events. Dr. Bernet was concerned that without residential treatment, Petitioner will touch and sexually assault another person in a serious way. He noted an extensive history of outpatient, home-based, and school-based interventions. He also noted that the great majority of children and adolescents with Asperger’s disorder were treated in the community and attend special education programs. Dr. Bernet recommended a residential treatment program with an understanding of Asperger’s disorder and other PDDs (Pervasive Developmental Disorders) and an active treatment approach that helps Petitioner improve social skills and give up unhealthy preoccupations. He also felt that this program should involve group, individual, and family therapy, and an appreciation that Petitioner’s intellectual functioning is considerably higher than this measured Full Scale IQ. He further recommended that Petitioner have “a special education program that can address [W.A.’s] learning disability.” He noted that Petitioner’s condition met the criteria for admission to a residential treatment facility because, *inter alia*, the adolescent’s current living environment does not provide the support and access to therapeutic services necessary for recovery.

3. TennCare, Tennessee’s version of Medicaid, found that Petitioner needed residential treatment, probably based on Dr. Bernet’s report. It is specifically noted that in order to qualify for TennCare coverage for residential treatment, there was a finding that there was no

³ His report makes note of Petitioner’s teacher’s statement that W.A.’s lack of “social skills” made him unable to understand that it was socially inappropriate to talk about sex in the way he did. She said that Petitioner’s sexual statements and behaviors had improved this year, as opposed to the last year (referring to the 2007-2008 school year). Dr. Bernet observed no behavioral problems during the time he actually observed Petitioner in school.

less costly alternative to an expensive residential treatment program: that is, TennCare determined that in-home treatment modalities such as outpatient treatment, CCFT services, or other treatment that did not involve residential treatment, were not sufficient to meet Petitioner's needs.

4. The reports of Petitioner's behavior at home are horrendous. He stays awake at all hours of the night (his parents allow him to nap during the day). He looks at pornography on the internet. Sometimes, he will try to sneak out of the house. His sexually inappropriate behaviors are fairly constant. He is violent to his siblings and his mother. Suffice it to say, his in-home behaviors clearly show a need for residential treatment, as recommended by Dr. Bernet and determined by TennCare to be appropriate⁴. As a medical matter, residential treatment is appropriate. In fact, Petitioner medical condition cries out for residential treatment.

5. When it comes to Petitioner's behavior and performance within the school setting, however, there is a large difference with the behavior observed by Dr. Bernet with Petitioner's father and what is reported at home. While Petitioner has had violent episodes at school, as well as sexually inappropriate behavior, the frequency and severity of the behaviors is of an entirely different quality. Records kept by the school relating to his episodes of violent behavior or sexually inappropriate behavior show marked improvement in those areas. Testimony from witnesses likewise establishes marked improvement in his behavior. He is now allowed to walk in areas of the school unsupervised. His behavior on the school bus has improved. He attended his teacher's wedding. He has gone on public outings. Petitioner's behavior has improved to the extent that consideration is being given to mainstreaming Petitioner in a couple of years. Likewise, his behavior in the public library, where he spends considerable time, has caused few

⁴ It is noted that Petitioner's parents have refused in-home help with Petitioner.

problems. In short, there is a remarkable difference between Petitioner's behavior outside the home and inside the home.

6. Petitioner has made considerable educational progress in his current placement. His TCAP scores have risen markedly. He made very significant advances academically, gaining three years academically in one calendar year. In fact, it is entirely likely he could receive a regular high school diploma if the current improvements are continued.

8. The question in this matter is whether Petitioner needs residential treatment to receive an appropriate educational benefit. As a factual matter, it would appear that he does not. He has been making marked progress educationally, without residential treatment. He may need residential treatment to correct his behavior outside the school setting, but his behavior within the school setting does not prevent his from progressing. He has progressed. Residential treatment has not been necessary for him to make the progress, both educationally and behaviorally, that he has clearly made. Dr. Bernet's report itself does not speak of the need for residential treatment to receive an educational benefit. In fact, he recommends residential treatment partly because Petitioner's current living situation does not provide the necessary support. In his testimony, he recommended a number of interventions to enable Petitioner to enable him to make progress in school. Notably, residential treatment was not one of them. Dr. Bernet did note that getting arrested for behavior in the community "would interfere with his ability to have a good education." He thought treatment would need to be pervasive, throughout the school day, evenings, and weekends, to correct these behaviors.

9. Petitioner was observed by Ms. Dian Bridges in his classroom four or five times between May and October of 2007⁵. She observed Petitioner to be verbally, physically, and sexually aggressive to the point of needing to be restrained. She identified four goals for an

⁵ It is specifically noted that Ms. Bridges was denied permission to observe Petitioner in his home.

appropriate IEP: decreasing inappropriate sexual comments to zero occurrences over four weeks, decreasing verbal aggression to ten occurrences over four weeks, decrease physical aggression to zero occurrences in six weeks, and decrease property destruction to zero occurrences over eight weeks. She was of the opinion that residential treatment was necessary for safety reasons. She identified the safety issue as wandering at night. She noted, however, a decrease in dangerous behaviors between her May observation of Petitioner and that of October in 2007. His behavior in May required Petitioner be restrained several times. This was not necessary at all during her October observation. Ms. Bridges is a practitioner of applied behavioral analysis (ABA). Metro does not use that treatment mechanism, but rather another known as reality therapy. Her recommendations related to use of ABA, as opposed to the reality therapy used by Metro.

10. Petitioner urges that his behavior impedes his academic progress. It undoubtedly does. There is no showing, however, that placing him in a more restrictive environment would lead to greater educational progress, or a showing that he is not now making educational progress. In fact, the proof is that he very well may progress to the point that he receives a regular diploma. Were his behavior outside the classroom to lead to his incarceration, it seems likely that his educational progress would slow, or cease. There is a reasonable possibility that legal troubles may well await the Petitioner for his activities outside the school. Residential treatment is the best treatment to avoid these legal troubles. This was also TennCare's conclusion. Were this case about whether residential treatment is necessary to prevent legal trouble for behavior outside the school, and the effect that this trouble would have on his education, this case would be completely different. In answering the question of whether residential treatment is necessary to provide FAPE, however, it would seem that the proof establishes that he is currently receiving FAPE. He is progressing rather well, making

considerable educational gains in a far less restrictive environment. His behavior, at least in the school, is improving. He is making real and substantive progress in both his education and his behavior, at least in the school setting. His school behavior without residential treatment does not prevent him from receiving FAPE. He is, in fact, receiving FAPE. He has made great strides and may well receive a regular diploma. Simply put, only if it is incumbent upon the LEA to attempt to prevent behavior outside the school, such as getting arrested, from interfering with Petitioner's education is residential treatment necessary for Petitioner to receive FAPE. If this be the obligation of the LEA, then residential treatment is necessary. If the question is whether residential treatment is necessary for Petitioner to make educational progress, without regard to whether his behavior outside the school setting results in arrest or other consequences that would impede his education, then residential treatment is not necessary. The less restrictive environment of his current placement has resulted in appropriate educational progress⁶.

Due Process

11. The IEP for the 2007-2008 school year was developed at an IEP meeting on December 6, 2007. It was handwritten and signed by all six school officials and by Petitioner's mother (Petitioner's mother signed the IEP, but did not indicate either agreement or disagreement with the IEP). This handwritten IEP was then entered electronically into the school system's computer; it was not, however, entered as written. Changes were made without notice to anyone in the area of behavioral goals. Instead of the goals of zero occurrences of

⁶ Dr. Bernet testified that he thought that residential treatment was necessary for Petitioner to make meaningful academic progress. He also testified, however, that Petitioner's problems, particularly the sexual preoccupation, would cause trouble that would impact his education, as opposed to his problems directly interfering with his education. He noted that sexual preoccupation would cause distraction in school, however. He felt that residential treatment was necessary to correct this perseverative behavior. It may well be necessary to correct the behavior, but the proof establishes that it has not been necessary to provide meaningful academic progress, since the Petitioner was, in fact, making meaningful academic progress. The need is medical, not educational.

inappropriate sexual comments over a four week period and zero instances of physical aggression over a six week period discussed at the IEP meeting, the IEP was changed to set a goal of 80% mastery in these two areas. Additionally, this electronic IEP indicated that both parents had signed the IEP, and indicated that they had checked boxes they had not actually checked in the IEP they actually saw.

12. A further meeting was held on January 31, 2008. This meeting was to discuss the Functional Behavioral Assessment and the Behavioral Intervention Plan (respectively, FBA and BIP). This meeting was not to formulate a new IEP, and no signature page was circulated, as would happen in a new IEP meeting. Thus, the IEP which was in effect was the electronic IEP, the one the parents had never seen, the one that changed the goals.

13. Additionally, communication between the LEA and the parents was less than optimal. Petitioner's mother had difficulty obtaining incident reports. She was not routinely furnished with them but had to request them; even then, she had difficulty obtaining these reports, and at times did not receive them at all. It is noted, however, that Petitioner's parents refused the LEA permission to have Petitioner evaluated. It would seem that communication and cooperation between the two was far less than optimal.

CONCLUSIONS OF LAW

1. Petitioner bears the burden of proof in this matter, by a preponderance.
2. The LEA violated IDEA procedures. The alteration, without notice, of the IEP constitutes a significant violation of these procedures. An IEP requires consideration of the strengths of the child, the concerns of the parents for enhancing the education of the child, the

results of evaluations of the child, and the academic, developmental, and functional needs of the child. 20 U.S.C. § 1414(d)(3)(A)(i)-(iv). When the IEP that is adopted at the meeting is later changed, it must be done at another IEP meeting or by mutual consent of the parents and the LEA. This was not done here. While the only significant changes related to the zero occurrences to 80% mastery change in behavioral goals, these changes were made in violation of the notice requirements for IEPs, as well as preventing the participation of the parents in reaching these changes. It may well be that the changes were inadvertent, but inadvertent or not the changes violated the IDEA provisions relating to notice and participatory rights of the parents.

3. Violations of the procedural rights under the IDEA can result in denial of FAPE if those violations “significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents’ child.” 20 U.S.C. § 1415(f)(3)(E)(ii). Procedural violations may also deny FAPE if they impede the child’s right to FAPE or cause a deprivation of educational benefit. *Id.* These last two are not present; the changing of the goals did not impede the child’s right to FAPE nor did it cause a deprivation of educational benefit. The question here is whether the changing of the goals significantly impeded the parent’s opportunity to participate. While it is not entirely clear, it would seem that the changes did not rise to that level. Of the four areas that must be considered in an IEP, the changes did not involve any consideration of the strengths of the child, the concerns of the parents, or the evaluations of the child. The changes, from zero occurrences to an 80% reduction, alter certain behavioral goals set forth in the IEP, but do not alter the basic thrust of the document, even as far as the academic, developmental, and functional needs of the child; that is, the behavioral problems addressed in the goals were understood by all parties, as

were the interventions and supports to address the problems. These did not change, the goals were, however, lowered somewhat. An IEP must contain a description of how the child's progress toward meeting the annual goals will be measured. 20 U.S.C. § 1414(d)(1)(A)(i)(I)-(VII). These changes certainly violated the parents' rights to participation in changes to the IEP.⁷

4. The changes, however, do not seem to have been of such magnitude as to have impeded the parents' opportunity to participate in the decision making process in a meaningful way. The parents did participate in the IEP process and in setting academic and other goals. When the changes were made to the goals relating to the two most important behavioral goals were made, the parents were deprived of participation. This change, however, does not rise to the level of a denial of FAPE. The Petitioner is in the position of asserting that his behavior is such a problem that it requires the most restrictive of settings, residential treatment, while maintaining that the difference between complete eradication of these behaviors and an 80% reduction constitutes a denial of FAPE.

5. The IEP developed at the December meeting, and as implemented with the improper changes, was reasonably calculated to enable the child to receive educational benefits. The proof, as it is said, is in the pudding. Petitioner has made, and was continuing to make substantial, significant academic progress. His performance went up three grade levels in one year. His problems behaviors, at least in the school setting, were significantly decreased. He was on a track which well could lead to a regular diploma, and possibly even allow him to be mainstreamed.

⁷ To the extent that the LEA asserts that these changes were discussed in subsequent meetings, as they probably were, it is noted that these meetings took place at least two months after implementation of the IEP. The changes had been acted upon for two months before the parents were aware of them, at best. Further, there was no compliance with the signature, written plan, etc. requirements of the IDEA.

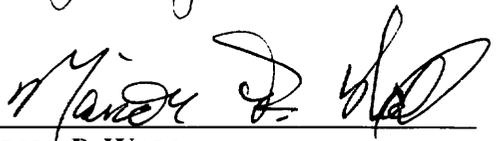
6. Petitioner alleges that his sexually inappropriate behavior deprives him, and his classmates, of meaningful educational benefits, and can only be corrected by residential treatment. Again, the proof is that the Petitioner has received meaningful educational benefits. Petitioner requests an Order that requires residential treatment. Such is not necessary. Petitioner is already receiving FAPE at a much less restrictive level.

7. Petitioner is the prevailing party with respect to the LEA's violation of IDEA procedures. The proof clearly shows that the IEP in effect was not that which was adopted with the participation of Petitioner's parents. While not rising to the level of a denial of FAPE, this violation is a serious one.

8. The LEA should convene an IEP to develop appropriate academic goals and determine appropriate related services for Petitioner. This IEP should adopt as goals those set forth in the handwritten IEP previously developed, provided that events have not overtaken those goals so as to render them inappropriate (such as Petitioner now meeting those goals).

It is therefore ORDERED that Petitioner be found the prevailing party with regard to these violations, that an IEP meeting be convened which will adopt the goals set forth in the handwritten IEP of December and develop appropriate academic goals and determine appropriate related services.

Entered and effective this the 26th day of January 2009.


MARION P. WALL
ADMINISTRATIVE JUDGE
ADMINISTRATIVE PROCEDURES DIVISION
Office of the Secretary of State

Notice

Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee or 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 appeal or review must be sought within sixty (60) days of the date of the entry of a 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.