

01-125

VIRGINIA:

PUBLIC SCHOOLS  
DUE PROCESS HEARING  
REMAND OPINION  
October 29, 2003



RE:

by:

And next friend,

Plaintiffs.

BACKGROUND OF THE CASE

A due process hearing was held on August 6, 2001. The Hearing Officer ruled that speech/language therapy for two (2) hours per week and occupational therapy for two (2) hours per week, which the student had received during the previous year should not be reduced in the ESY 2001 for , a child with autism.

The School Board appealed to the United State District Court for the Eastern District of Virginia which Court reversed the hearing officer, ruling that the Hearing Officer placed too much, if not exclusive, reliance on the expert testimony and failed to give appropriate consideration to the basis for each witness's opinion. vs. School Board, . 2002).

The District Court's opinion was appealed to the United States Court of Appeals for the Fourth Circuit which vacated the District Court's decision and remanded to the District Court with instructions that the District Court further remand the case to the Hearing Officer for reconsideration under the MM Standard, *MM vs. School District of Greenville County*, 303 F. 3d 523 (Sept 6, 2002) and directed that upon such reconsideration, the Hearing Officer shall consider the "window of opportunity" evidenced presented by the Plaintiffs to the extent that it is relevant to the question of whether the level of serviced provided in the Summer 2001 IEP were

adequate to prevent the gains that had made during his regular kindergarten school year from being significantly jeopardized. v. School Board, 2003)

On May 19, 2003 the District Court remanded the case to the Hearing Officer in accordance with the directions of the Fourth Circuit.

Opening memorandums were filed on behalf of the and on June 20, 2003 and reply memorandums were filed on behalf of both parties on June 27, 2003. Oral argument was heard on August 21, 2003.

The 2001 Opinion written by the Hearing Officer predated the Fourth Circuit's opinion in the MM Case (citation omitted) and therefore he lacked the benefit of a clear standard for determining when extra school year (ESY) services are appropriate under the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. § 1400 et seq.

#### Background of the Student

was born . By the age of two years 's parents noticed abnormal reactions, Transcript (Trial Tr 144) and sought professional help for their son.

On October 9, 1997 at the age of three years and four months, was examined by Dr. at 's Hospital in , VA and it was determined that may evolve as a child with a developmental language disorder and it was recommended that he be referred to a Preschool Early Intervention Program, School Board Exhibit 9 (SB-9).

On November 11, 1997 a psychological evaluation was performed at 's Hospital in , Virginia, with the impression that suffered from Pervasive Development Delay and Expressive and Receptive Language Disorder. During this time his parents had enrolled him

in the Center preschool program in , VA and it was suggested that he be eligible for speech and occupational therapy services (SB-10).

At the age of three years six months, he was evaluated by a speech therapist at 's Hospital and it was recommended that he receive speech therapy one time a week for 60 minutes for 60 days (SB-11).

By March of 1998 was found to be eligible for Early Childhood Special Education Services by (SB-17). He began receiving services from (" ") in September of 1998 by attending a preschool program for children with disabilities. The program was designed for children that were behind their peers. He received three hours per day instruction at Elementary School in for the fall of 1998 and the spring of 1999 (Trial Tr 150-151)

An Individual Education Plan (IEP) was developed for in May of 1998 with the providing special education services for three hours per day five days per week. During this time 's chronological age was 42 months and his development was 30 months (SB-25).

For the school year 1999-2000 he did not enter kindergarten but instead attended a program called which was a step before kindergarten. The IEP formed in November of 1999 to May 2000 reflects that change and while attending was receiving individual OT therapy two times per week and group therapy for one hour bi-weekly from of Services at the parents' expense (Trial Tr 76 et seq.)

In January of 2000 was evaluated by , Ph.D., Clinical Neurologist, who noted "from a school perspective, ( ) continues to need a totally smaller environment (not just a smaller classroom) that naturally incorporates multi-sensory teaching, but communicating models (SB-40 recommendation 10).

The \_\_\_\_\_, at the request of the parents, provided Extra School Year Services (ESY) for \_\_\_\_\_ for the summer of 2000 starting on July 11, 2000. The \_\_\_\_\_ provided speech and language services for 16 sessions of 45 minutes each and 8 one-hour sessions of OT (SB-43). In addition, at the parents' expense, \_\_\_\_\_ had four weeks of occupational therapy camp, five days a week, three hours a day, or 15 hours a week, for four weeks (Trial Tr 185).

In June of 2000 \_\_\_\_\_ was evaluated at the \_\_\_\_\_ Center with a conclusion of "finally it is likely that ( \_\_\_\_\_ ) will require an extended school year for the foreseeable future. Reinforcement of skills mastered and preparation for upcoming material will be essential if \_\_\_\_\_ is to avoid regression during the summer breaks and to benefit appropriately from the school year program." (SB-43A, Recommendation E)

During \_\_\_\_\_'s regular kindergarten year the \_\_\_\_\_ provided two hours per week of speech/language therapy and two hours per week of occupational therapy.

For \_\_\_\_\_'s regular kindergarten year, as a part of the agreed IEP, the \_\_\_\_\_ provided with two hours per week of speech/language therapy and two hours per week of occupational therapy (SB-47- \_\_\_\_\_ 35).

For the summer of 2001 the \_\_\_\_\_ recommended only two hours of speech/language therapy and two and a half hours of occupational therapy for the entire summer which the parents contend is a reduction of 90% in those services (SB-63). The reduction in services brought about the request for the due process hearing in August of 2001. The \_\_\_\_\_, in its 2001 ESY IEP, did provide other services to \_\_\_\_\_ and the \_\_\_\_\_ did comply with the balance of services which are not in contention.

In the MM Case (citation omitted), the Fourth Circuit ruled as follows:

ONE

Because the record does not contain findings by the Hearing Officer with respect to whether the level of speech/language and occupational therapy serviced provided in the Summer 2001 IEP was adequate to prevent the gains that made in these areas during his regular kindergarten school year from being significantly jeopardized, we are presently unable to conduct meaningful appellate review of the district court's judgment.

v. . . . *County School Board, Slip Op. at 13* (emphasis added). The Fourth Circuit then went on to say:

TWO

Accordingly, we vacate the judgment and remand with instructions that the district court further remand the case to the Hearing Officer for reconsideration under the MM Standard. We direct that upon such reconsideration, the Hearing Officer shall consider the "window of opportunity" evidence presented by the Plaintiffs to the extent that it is relevant to the question of whether the level of services provided in the Summer 2001 IEP was adequate to prevent the gains that had made during his regular kindergarten school year from being significantly jeopardized.

ONE:

Was the 2001 ESY IEP adequate to prevent the gains that made during the regular kindergarten from being significantly jeopardized during the summer?

The Special Education teacher, after considering input from both 's teacher, Mr. , and Mrs. , 's classroom assistant, who graduated with honors from The College of with a Bachelor of Science in Psychology and had experience with autistic clients, completed a "Consideration for Extended School Year (ESY) form". This form has 16 questions and I quote from part of them:

"Q7. Following periods of vacation or absence, does student show irreparable or permanent loss?"

- A7. Great difficulty with behavior in class after absence.
- Q8. Following periods of vacation or absence, does student show the ability to recover his/her loss?
- A8. Great anxiety produced.
- Q11. What permanent, irreparable or major loss of critical life skills will occur as a result of interruption of this student's education? State specific goals/objectives to be addressed in ESY.
- A11. Emerging communication, social, behavioral (sensory) skills, cognitive skills, fine motor skills.
- Q12. What previous interruption in the educational program has caused a permanent, irreparable or major loss in this student's ability to perform? Be specific regarding length of interruption, pre/pos test scores or other objective measures of performance.
- A12. Christmas-Thanksgiving. After illness, . has great difficulty reorienting to the school environment, structure and social settings. He seems to have anxiety, difficulty transitioning and general performance in school setting.
- Q13. What specific evidence do you have that demonstrates the inability of this student to recover or recoup following an interruption in instruction?
- A13. has done well in the Kg. Class with intense 1:1 support. After absences he may demonstrate anger, difficulty responding to direction, expressing himself. Classroom teacher 1:1 assistant report loss of social skills as well as performance after absences.
- Q14. What critical life skills are a "breakthrough" point that, without ESY, would negatively affect educational benefit during the regular school year?
- A14. Behavior modification, cognitive skills, communication and social skills that are necessary for success in the school setting are at a "break through" point.
- Q15. If the student does not receive ESY services, will the degree of progress on critical life skills affect the student's ability to benefit from education during the regular school year?

A15. Without a continuation of behavior modification program, communication, social, may not have the skills to perform in an academic setting next year.

Q16. Would interruption of programming for interfering behaviors prevent the student from receiving some benefit from education during the next school year? If yes, how?

A16. 's self-stimulating behaviors and inappropriate behaviors in classroom framework interfere with his educational process."

Dr. , a leading pediatric neurologist who specializes in treating children with autism, reviewed pertinent documents and evaluating Hearing Tr at 20-47, 360-61, testified that without an intensive program over the summer of 2001 he's going to regress...every time the new school year starts, you're going to have to go back and reinvent the wheel, not completely, not from the ground up, but your going to have to go back and basically retool...children with autism [have a] profound ability to regress. Hearing Tr 39

Jr., 's regular education teacher, has signed the report for which indicates his agreement to the contents of the report and he was not called to testify. (Tr 409) His input, with Mrs. 's report, indicates that he believes that will regress during the summer.

was employed by the as 's one-on-one assistant. She spent six hours a day with him during the regular school year, more time than any other teacher. She graduated with honors from with a B.S. in psychology. Ms. , like Mr. , signed Ms. 's "Consideration for ESY" and testified that she agreed with the contents of that report. (Hearing Tr 411) She had previously worked with children who were autistic (Transcript 397) and at the time of her testimony was employed at the Center. Transcript 396

In this case, the \_\_\_\_\_ agrees that ESY services should be and were provided for during the summer. The question is to the extent of the services. Further, the question is, was it reasonable for the \_\_\_\_\_ to reduce the speech/language services from two hours per week to two hours for 11 weeks and likewise reduce the OT services from two hours per week to 2.5 hours for 11 weeks.

The MM case says that ESY services are appropriate under the IDEA when the benefits accrued to a disabled child during the regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months, or stated another way, ESY services are warranted when they prevent significant regression or skills or knowledge that would seriously affect a disabled child's progress towards self sufficiency.

In this case, Ms. \_\_\_\_\_, the special education teacher, and Ms. \_\_\_\_\_, 's one-on-one assistant, all agreed that \_\_\_\_\_ did regress after absences from school, during holidays or extended absences.

\_\_\_\_\_, Ph.D. is a licensed clinical psychologist based at the \_\_\_\_\_

\_\_\_\_\_. He works exclusively with autism and has followed \_\_\_\_\_ since 2000, a full year before the dispute that gave rise to these proceedings. Dr. \_\_\_\_\_ formulated his conclusions based on his individualized evaluation of \_\_\_\_\_, including clinical interviews, observation of \_\_\_\_\_'s behavior, a battery of tests, as well as a review of the pertinent records from \_\_\_\_\_'s school file and from other professionals. Hearing Tr at 194-95. Based on this evaluation, he reached the following result:

[I]t is strongly recommended that \_\_\_\_\_ receive [ESY] services throughout the summer of 2001, with no diminution in the frequency or duration of related services...*Reducing the frequency of related services represents a significant change and a threat to the progress that \_\_\_\_\_ and his teachers have worked so hard to achieve.* ( \_\_\_\_\_ Exh. 33, p. 6, emphasis added).



, OTR/V, a licensed occupational therapist, owns and operates Integrated Therapy Services. She has worked with on a private basis, employed by 's parents, since 1999. She had in two kid-in-motion camps during the summer of 2000 and has worked with and tested on a private basis. Her report of July 14, 2001 ( Tab 36) concluded in part:

" certainly does not have the functional fine motor skills to be successful with the writing demands of first grade. His standardized scores placed in the 1st-2nd percentile or at two-three years below his peers for fine motion skills. He continues to need specialized training techniques for his emerging writing skills...He needs to continue with the same frequency and intensity of these services so as not to regress and to develop functional skills for the first grade."

, M.S., CCC-SLP, based her conclusions on 12 years experience as both a clinical and school-based speech-language pathologist, her experience working with twice a week since March 1998 - her testing of , and her review of an array of documents about from the . Exh. 21. She explained: "[ ] has shown a *marked tendency to regress* during previous breaks in services and, without an *intensive* ESY program, he will *definitely* experience *substantial regression* over the summer." Exhb. 21, p. 2 (emphasis added).

Mrs. regarded the 's proposal as inadequate, recommending that receive "not less than 16 sessions of speech therapy (at least 45 minutes each) over the 11 weeks of summer vacation" (compared to the 2 hours proposed by the ). While this was less than the 22 hours sought by the , Mrs. based her lower recommendation on the fact that services from the ' would be "supplemented by [ 's] parents." Exh. 21, p. 2. Under the IDEA, however, the 's obligation to provide an appropriate education is not diminished by the parents' ability to provide educational services for their child. Taking into account this adjustment, her opinion also supports the conclusion that speech/language therapy

must continue over the summer at the previously established rate in order to prevent significant jeopardy to the gains made in kindergarten.

The [redacted] relied on evidence that [redacted] will not regress during summer months or absences from school and instruction from [redacted] who has a Bachelor of Science and a Masters degree in speech pathology as well as 28 years of teaching experience and has worked with autistic children since 1976. During the 2000-2001 school year she worked with [redacted] four times per week but saw him in class five times a week.

According to Ms. [redacted]'s testimony and her letter of May 15, 2001, co-signed by [redacted] Stone, the occupational therapist, Ms. [redacted] and Ms. [redacted] felt that there has been no evidence that [redacted] has lost any communication skills during school breaks. Actually, he improved after winter break. He was more on topic and his behavior was less aggressive and that [redacted] has the language skills to perform in an academic setting. He also has the academic language needed to work on social language. His social language skills are weaker but should not impact academically. Social language skills are best learned in social settings with peers.

As to occupational therapy, there has been no evidence that [redacted] lost any fine motor skills during the school breaks. His kindergarten teacher felt that [redacted] kept pace with his peers in developing his fine motor skills. Although handwriting is an area of weakness he seems to perform this activity best while in the classroom setting and not while under individual scrutiny. Some of [redacted]'s sensory needs may stem from the over stimulation of an excessively full schedule, which does not allow for much relaxation. (emphasis added)

[redacted] needs to be with typically developing peers to work on social language and fine motor skills. Peer modeling with some direction from an instructional assistant under the direction of the speech pathologist and occupational therapist is appropriate to meet [redacted]'s needs. (SB-59)

The Court should, to the extent possible, defer to the considered rulings of the administrative officers who must also give appropriate deference to the decisions of professional educators but that does not mean that the courts should not consider all of the evidence especially when the evidence from the professional educators is in conflict.

TWO:

The "window of opportunity" for an autistic child to learn, from the expert testimony, seems to close at about eight or nine years of age. was seven years of age at the time of the original hearing. The window may be closed at the time of the remand hearing, but the parents of did continue, at their expense, the speech/language and occupational services that were provided during the kindergarten year.

From the transcript of the original 2001 hearing, the "window of opportunity" was described by , M.D., a leading pediatric neurologist who specializes in treating children with autism. He states as follows: "...we know language learning, it's very, very concrete...and language learning...does occur through life, but it's much more linear; whereas language learning before eight or nine years of age is exponential. Hearing Tr 36... what I would chose to call exponential learning versus linear learning...The capacity of a child for language prior to eight or nine years of age is much more exponential. By that, I mean, 1, 2, 4, 6, 8, 16, 32, 62; whereas, beginning around nine years of age, it becomes 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and so on, so that you have a great deal in the way of more capacity...What it says is, that prior to that period of time, he has greater facility to be reprogrammed. After that time, he has less facility. His facility is linear, whereas before, it's much more exponential." (Trial Tr 37)

I do feel very qualified to say, that if you mark time with a child who has autism, you lose. If you decelerate services, you lose. And that if you're going to make an impact, the only way to

make an impact is to continually accelerate services within the child's limit of tolerance. Trial Tr 39

Further, testified that, "Here you have a child who's relatively well-behaved and who has the capacity for language learning and is markedly deficient in pragmatic language, and you have this wonderful opportunity that could make a profound difference in how -- in what the outcome is here for this child, because he shows tremendous potential. He is a high-functioning child.

Q. Doctor, with respect to 's potential outcome, would you talk about 's future vocational ability and what affect, if any, it will have on that ability if we don't take advantage of this summer 2001?...

A. So that, again, we're dealing with a window of opportunity here where the capacity for language learning, that is the who, why, where questions, which transpose that subsequently to the work setting, when the boss says, This is why you should do it, this is how you should do it -- and so you've got this capacity for language learning now, which is exponential. And by losing this golden opportunity, the down-the-road issues are, one, because of frustration, these kids become aggressive, the behavior problems intervene, ..." Trial Tr. 42

Discussing the "window of opportunity" is not an effort to maximize the efforts of the school system in providing services. It is an effort by the medical field, specializing in the study of the brain, or neurology and autism, to explain to the school system when the brain of an autistic child is most receptive to receive and retain the basic information that the school system is providing to the autistic child.

On cross examination, , Ph.D., an expert on autism was asked:

Q. Is it your testimony that [redacted] cannot receive any educational benefit during the summer of 2001 if he receives the services that are provided in this IEP, but he does not receive additional related services that you recommend?

A. It's my judgment that [redacted] would not continue to develop and would likely experience regression and that that would be harmful to his educational process.

On remand, the [redacted] School Board (the "School Board") has the burden of proving, by a preponderance of the evidence, that the services provided in Summer 2001 IEP were adequate to prevent the gains that [redacted] had made during his regular kindergarten school year from being significantly jeopardized. (Trial Tr 217)

After a careful review of all the evidence, it is my judgment that the [redacted] has not carried the burden of proving that the ESY 2001 IEP was appropriate for the needs of this student to prevent regression during the summer months and to prevent the gains that he made during the regular kindergarten year from being significantly jeopardized.

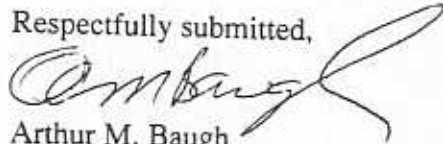
ORDER

The 2001 ESY/IEP should be amended as follows:

- 1) [redacted] should receive two (2) hours of speech/language therapy per week.
- 2) [redacted] should receive two (2) hours of occupational therapy per week.

That this is necessary to prevent the gains that [redacted] made during the regular kindergarten school year from being significantly jeopardized.

Respectfully submitted,

  
Arthur M. Baugh  
Administrative Hearing Officer