
**Due Process Hearing
for
[REDACTED]
Stone County School District
Wiggins, Mississippi
February 28-29, 2008**

Individuals in attendance:

	<u>Name</u>	<u>Relationship</u>
For the parent:	Rebecca Floyd, Esq.	Parent
	Sue Cannimore	MS Protection and Advocacy, Inc.
		MS Protection and Advocacy, Inc.

	<u>Name</u>	<u>Relationship</u>
For the district:	Wendy Rogers	Director of Special Education
	James Keith, Esq.	Counsel for the district
	T. Michael Cronin, Esq.	Counsel for the district
	Ann Box	Legal Assistant

Witnesses for the child:

	<u>Name</u>	<u>Relationship</u>
PW-1	[REDACTED]	Parent
PW-2	[REDACTED]	Psychiatrist for child
PW-3	[REDACTED]	GED Instructor
PW-4	[REDACTED]	Administrator, MS State Hospital
PW-5	[REDACTED]	Psychiatrist for child
PW-6	[REDACTED]	Psychiatrist for child

Witnesses for the District:

	<u>Name</u>	<u>Relationship</u>
DW-1	[REDACTED]	Psychologist
DW-2	[REDACTED]	Speech Pathologist
DW-3	[REDACTED]	Psychometrist
DW-4	[REDACTED]	Psychiatrist
DW-5	[REDACTED]	Behavioral Specialist
DW-6	[REDACTED]	Counselor, Stone High School
DW-7	[REDACTED]	Director, Special Education

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Evidence

Parent's evidence:

- P 1 Contact Reports by Sue Cannimore, included for the purpose of assisting the HO in understanding the chronology of the case
- P 2 Documents from the School Attendance Office and MS Gulf Coast Community College, Perkinston Campus
- P 3 Evaluations from Memorial Behavioral Health
- P 4 Evaluations from Oak Circle, MS State Hospital
- P 5 Evaluations from Pine Grove/Forrest General Hospital
- P 6 Evaluation from Stone County District and associated documents

District's evidence:

- SD 1 Parents' Request for Due Process
- SD 2 District's Response to Parent's Due Process Request
- SD 3 1/29/08 Resolution Offer
- SD 4 Educational Summary
- SD 5 MDE Policies and Procedures re: Eligibility
- SD 6 Documentation Re: Re-Evaluation/Eligibility
- SD 7 Correspondence between the parties
- SD 8 Records Request to Gulf Coast Mental Health
- SD 9 4th Admission to Forrest General/Pine Grove (8/13/07 - 8/23/07)
- SD 10 3rd Admission to Forrest General/Pine Grove (7/16/07 - 7/25/07)
- SD 11 2nd Admission to Forrest General/Pine Grove (6/18/07 - 7/12/07)
- SD 12 1st Admission to Forrest General/Pine Grove (6/4/07 - 6/16/07))
- SD 13 Documentation re: _____ Hospital Admission (3/13/07 - 3/20/07)
- SD 14 Documentation re: _____ Health Admission (2/16/07 - 3/12/07)
- SD 15 Documentation re: Biloxi School District Enrollment (8/10/06 - 8/14/06)
- SD 16 Discharge from _____
- SD 17 Documentation re: _____ Admission (2/23/06 - 6/6/06)
- SD 18 Documentation re: Harrison County School District Enrollment (1/06 - 3/06)
- SD 19 Documentation re: Previous Enrollment in Stone County School District
- SD 20 Prescription, Handwritten letter, Compulsory School Attendance Enforcement
- SD 21 Documents faxed on first day of hearing

Finding of Fact

_____ (hereafter referred to as the student) is a _____ year-old student who has had a history of _____, being initially diagnosed with psychosis and subsequently diagnosed as having _____ he has a history of _____ abuse (sd9-sd14, sd17) which may have exacerbated the psychoses. He has been hospitalized numerous times for _____ with hospitalizations that have included Memorial Hospital, Forrest General Hospital - Oak Grove, Mississippi State Hospital and

The student's educational history indicates placement at numerous schools; he was initially enrolled in kindergarten in the Biloxi School District, with subsequent enrollments in at least seven other schools prior to his enrollment in the Stone County School District in January of 2005. He was placed in the Stone County alternative school in April 2005 and started attending Stone County High School in August 2005 (pw1). He began exhibiting psychiatric problems during the fall of 2005, shortly after the occurrence of Hurricane Katrina. His first hospitalization for the disorder occurred in November 2005 when he was placed in Memorial Hospital in Gulfport (pw1).

During the student's hospitalization at Mississippi State Hospital, an educational evaluation was conducted and an IEP prepared on February 24, 2006 (sd21). At the time of discharge residential placement was discussed with the parents, but it was determined that a residential placement was unavailable; the psychiatrist's testimony regarding the need for residential placement was equivocal (pw5). Following his discharge, the student was briefly enrolled in the Biloxi School District (sd15) and subsequently had a number of hospitalizations related to his psychiatric disorder (sd9-sd14). At the time of discharge from the second hospitalization at Forrest General Hospital in July 2007 it was recommended that the student attend "local AA/NA meetings" (sd12, pw1). Although the attending psychiatrist testified that residential placement would provide for better control of the student's behavior, it was also testified that a day treatment program would be acceptable for educational purposes (pw6).

In September 2007 the student's father approached the Stone County School District, inquiring about enrollment for his son. The father met with the program developer and expressed an interest in having the district provide a residential placement for his child at St. Michael's Academy (which has subsequently ceased operation). During the initial meeting between the program developer and parent, the program developer was unaware of the existence of an IEP from Mississippi State Hospital (dw7). Subsequent to this meeting, the school district conducted an educational assessment of the student, denying eligibility on 11/2/07 due to "current drug use" (pd6). The district did not conduct drug testing to confirm current drug usage, rather basing their decision on records from the student's hospitalization during the summer of 2007 which reported positive results from drug tests (dw7). When ultimately presented with documentation from Mississippi State Hospital confirming eligibility under an EmD classification, the district responded by questioning the validity of the ruling on the basis of insufficient documentation. Specifically, the district maintained that the limited number of behavioral logs obtained by Mississippi State Hospital during the 2006 hospitalization were inadequate to determine if the student's lack of educational progress was due to an emotional disorder or due to other factors such as absenteeism, drug use or social maladjustment (pw7). Based on the district's refusal to provide residential treatment for the student, the parent requested a due process hearing on January 14, 2008 (sd1; hearing officer's note: fax transmission date 1/14/2008; signature date of "8/27/0707" appears to be erroneous).

Findings of Law

The issues involved in this due process dispute center upon:

- the placement of the student in a residential facility as requested by the parent
- the denial of eligibility for special education services by the district on the basis of drug use
- the validity of the educational evaluation conducted at the Mississippi State Hospital in 2006

Under IDEIA, it is required that a child be placed in the least restrictive environment, where the student can be educated with non-disabled peers to the greatest extent possible (20 U.S.C. 1412(a)(5)(B)). Further, Mississippi Department of Education policy states that “[n]o special classes, separate schools or other removal of children with disabilities from the regular educational environment occur unless 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.” At the time of the student’s discharge from Hospital in July [redacted] stated that the student “[m]ay be treated in a less restrictive environment than [redacted].” During the period between July 2006 and August 2007, there appeared to be no specific recommendations for institutionalization. Although some witnesses mentioned institutional placement as a possibility, no testimony was provided to confirm that it was the *only* placement that would provide educational benefit for the student (pw4, pw5, pw6). As a result, it would be inappropriate for the school district to opt for residential placement as its initial placement since residential placement represents the *most* restrictive environment.

The district ruled the student ineligible for an EmD ruling under IDEIA, citing “current drug use” as the reason (pd6). Further, the district maintained that “[s]tudents who use drugs and/or alcohol may not be classified as children with disabilities under the IDEA because they do not meet the specific criteria of 34 C.F.R. 300.8.(c)” (sd2). This section defines emotional disturbance as follows:

Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child’s educational performance:

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behavior or feelings under normal circumstances.
- (D) A general pervasive mood of unhappiness or depression.
- (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section.

Clearly, 34 C.F.R. 300.8(c) does not specifically mention drug use as a disqualifying factor in determining eligibility under IDEIA, and therefore the district's denying eligibility because of "current drug use" was incorrect. While it is obvious that an accurate educational assessment cannot take place while a student is under the influence of illicit drugs or alcohol, the period of abstinence required for an accurate assessment remains in question. One witness (pw2) stated that an accurate assessment could be made as long as the child was "not high at that time" while another alluded to a sixty-day period of stability, stating that this period of time was also necessary to allow the collection of behavioral and attendance data needed to rule out social or environmental issues (sd1). While drug use may make accurate assessment difficult and a sixty-day period of stability may be necessary for accurate assessment, there is no provision under IDEIA that permits a district to delay implementation of services until "stability" is achieved.

The district maintained that the assessment conducted at the [REDACTED] I was completed without sufficient behavioral data and that the resulting eligibility ruling was invalid. Specifically, the district maintained that the four behavioral logs recorded at Mississippi State Hospital were insufficient to justify the EmD ruling. The Policies and Procedures of the Mississippi Department of Education do not state a minimum time period for collecting behavioral data (section IV-8). Under IDEIA, school districts must provide special education services when children with IEPs change school districts. Districts must provide services comparable to those included in the previous IEP, in consultation with parents, until the previous IEP is adopted or a new IEP is developed. Clearly, the district is obligated to implement the previous IEP until a new IEP can be developed; while the district may opine that another district's IEP was incorrectly formulated, there is no provision under IDEIA that allows the district to arbitrarily invalidate the previous district's IEP. However, the parent's contention that the IEP must be implemented in a residential setting has no foundation, since the commitment at Mississippi State Hospital was made for medical reasons and, at discharge, that institution specifically stated that a less restrictive setting was appropriate.

SUMMARY AND DECISION

The current dispute involves an [REDACTED]-year-old student with a documented history of schizophrenia and polysubstance drug abuse. He has been hospitalized on numerous occasions since 2006 and has not been enrolled in school since that time except for a four-day enrollment in the Biloxi School District in August 2006. In August 2007 the parent approached the Stone County School District, requesting that the district provide residential placement for the child. The district declined to provide residential placement and conducted a comprehensive educational assessment in October 2007. Following that

assessment, the district denied special education eligibility in November 2007, citing "current drug use" as the reason for the denial.

Testimony and documentation clearly establish that the student has [redacted] it is also evident that he has used and most likely continues to use illicit drugs that exacerbate his condition. The student's behavior makes it difficult for the parent to provide for the child's needs; indeed, the father is to be commended for the efforts he has made in his child's behalf. A residential placement could not only provided for the student's educational needs, but would relieve the immense burden of providing round-the-clock supervision that is now borne by the parent. However, the requirement for least restrictive environment precludes the district's providing residential placement unless it can be documented that residential placement is the only means to provide educational benefit. The district offers a number of less restrictive environments which may provide for the child's educational needs without institutionalization. Therefore, the district must be given the opportunity to provide an educational program for the student that does not require residential placement.

The district maintained that it could deny eligibility on the basis of current drug use. While there is no doubt that evaluating a child who uses drugs is problematic, the district and the parent must make every effort to allow an accurate assessment to be made. Drug use, in and of itself, is not a sufficient reason to deny services under IDEIA; if it were, a child with an obvious handicapping condition could be denied services indefinitely if he or she was only an occasional user of illicit drugs. Further, the student possessed a valid IEP from a previous evaluation conducted at the Mississippi State Hospital. The district has an obligation to provide services under the previous IEP until a new IEP can be developed.

Therefore, it is the ruling of the hearing officer that:

- the district provide educational services under IDEIA consistent with those described in the IEP from Mississippi State School to the extent that such services can be provided in a non-residential setting;
- the district shall conduct an educational assessment and develop, in cooperation with the parent, an IEP designed to meet the educational needs of the child; this IEP shall provide for education in the least restrictive environment and shall not require residential placement unless such placement is deemed to be the least restrictive environment.
- the parent must insure that the student is free from the effects of drug use when the student is being evaluated for the purpose of developing the IEP; if, in the opinion of school district personnel, it is not possible to obtain valid test results due to illicit drug intoxication, such testing may be deferred only until the student is no longer exhibiting manifestations of acute drug intoxication.
- the district must not delay the assessment and/or development of the IEP on the basis of suspected drug use except to the extent that acute illicit drug intoxication delays evaluation.
- suspected illicit drug use shall not preclude the collection of behavioral data in

order to delay the development of the IEP unless the acute effects of illicit drug intoxication result in behaviors that are inconsistent with behaviors occurring in a non-intoxicated state.

This decision may be appealed in a court of competent jurisdiction.

Signed this 31st day of March, 2008.



Stephen E. Oshrin, Ph.D.

IDEA Due Process Hearing Officer