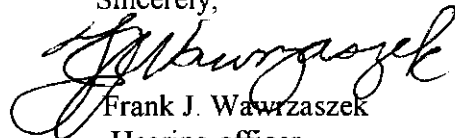


954 Sherman Street
Ypsilanti, Mich.48197
April, 2, 2000

Dear Mr. & Mrs. Duncan

Enclosed is a copy of my decision(s) in the matter of the due process hearing for Alex Duncan v. Birmingham Public Schools. If you have any questions please feel free to call me at 1-734 483 4335..

Sincerely,


Frank J. Wawrzaszek
Hearing officer

DECISION

IN THE MATTER OF THE DUE PROCESS HEARING

FOR

ALEX DUNCAN

v.

THE BIRMINGHAM PUBLIC SCHOOLS

HEARING DECISION: MARCH 29, 2000
HEARING OFFICER: F. J. WAWRZASZEK

Alex Duncan
v.
Birmingham Public Schools

INTRODUCTION:

A special education due process hearing was held on March 1, 2000, at the Pembroke School in Birmingham, Michigan. The primary concern in this matter is related to Free, Appropriate Public Education (FACE) and whether assistive technology is available and appropriate to meet the educational needs of Alex Duncan.

Alex Duncan is an eleven (11) year and eight (8) month old (B.D. 7/27/88) male, physically impaired student currently receiving special education services through the Birmingham School District. Alex was born with Cerebral Palsy and an optical neurological function secondary to C.P. with V Pattern Isotropy. In 1998, it was determined that Alex's visual acuity is 20/200 (right eye), 20/200 (left eye) and 20/100 (both eyes). Alex is the adopted son of Mr. and Mrs. Alan Duncan. He is a quadriplegic who has difficulties participating in regular instructional programs. At the present time, he is a fourth grade student, enrolled in the Pembroke School.

An Individualized Educational Planning (IEP) Team met on 5/13/99 to develop an appropriate program for Alex's 1999-2000 academic year. The Team found that Alex continued to be eligible for special education services under the category of Physically and Otherwise Health Impaired (POHI) as specified under R340.1709 of the Michigan Special Education Rules. The IEP Team listed eight (8) annual goals and twenty-eight (28) short-term objectives for consideration during the coming year. They decided that the categorical classroom would best meet his educational needs (approx. 17 hrs./wk.). Language arts, math and art were to be provided in the regular class. Support services in Occupational, Physical and Speech therapy, social work and Teacher Consultant services were also scheduled by the IEP Team.

One of the annual goals centered around the use of assistive technology to enhance Alex's independent use of the computer. A short-term objective listed under that goal stated that, "Alex will use a portable laptop as his main learning tool for activities involving reading, writing, math and test taking." (D. Ex. 8, p. 5) If followed to the suggested extreme, those statements could jeopardize Alex's educational progress. If the computer is used as an accommodation for the enhancement of a program that is part of the school curriculum, it may become an asset to his instructional program. Parents' perception as to what is required to meet this goal differs substantially with the District's position on the Issue. Reading the record will show that the concerns about assistive technology are near the obsessive and unrealistic level.

Since a resolution was not imminent, and since Mr. Duncan did not agree with the IEP as proposed by the Team, on 11/11/99, six months after the annual IEP, he requested a due process hearing. (D. Ex. 8, p. 11)

Alex was represented in this matter by ATTORNEY ANDREW MUDRYK, of Ann Arbor. The School District (D) was represented by MR. RICHARD KROOPNICK, from the firm of POLLARD AND ALBERTSON, of Bloomfield Hills, Michigan. Parties mutually agreed to the appointment of FRANK J. WAWRZASZEK as the Hearing Officer in this matter.

At the pre-hearing conference, participants agreed to set the hearing date for March 1, 2000. Deadlines were also set for the exchange of witness and exhibit lists in compliance with the five-day rule as specified in R340.1724b(1)c of the Michigan Special Education Rules. Parties agreed that all materials should be exchanged and postmarked no later than 2/24/00. A short statement describing each party's position prior to the hearing was also requested, and copies of the lists and the position statement were to be sent to the Hearing Officer.

Consistent with recent 6th District decisions in *Cordrey v. Eckert*, 917 F2d 1460 and *Doe v. Defendant*, 898 F2d 1186 (1990), which suggest that plaintiff/parent bears the "burden of proof," the burden was assigned to plaintiff.

PARENT POSITION PRIOR TO THE HEARING:

Plaintiff/parent indicated that one of their main concerns in this hearing was related to the availability of appropriate assistive technology (laptop computer) and software to aid Alex with his program. Along with the issue of software and hardware, there was a question of whether Alex had full-time access to the laptop, so that he could do homework and other educational tasks, at times when he was not at the School.

There was a question about the availability of a back-up computer in the event of the failure of the P.C. There was also a question as to whether the "IEP should specify the maximum out-of-service down time of the P.C.," at which time the back-ups would be provided.

Plaintiff questioned whether the IEP should define and require implementation of an appropriate training plan for Alex's health care parapro (aide).

Witness and Exhibit Lists: Mr. Mudryk listed seven potential witnesses and six exhibits in a timely manner.

SCHOOL DISTRICT POSITION PRIOR TO THE HEARING:

The District did not send a position statement because they were not informed about the issues in this matter until they received the parent statement.

Witness and Exhibit Lists: The District presented a list of 19 specific witnesses, three of whom were on the parent listing. The District provided a list of nine exhibits. Exhibit 9 listed 26 items of correspondence related to this matter.

DECISION; COMPUTER AS MAIN LEARNING TOOL, HARDWARE BACKUP AND TRAINING OF PARAPROFESSIONAL:

In the opinion of this Hearing Officer, THE PARENTAL DEMAND FOR USING THE COMPUTER AS THE MAIN INSTRUCTIONAL TOOL FOR MAXIMIZING ALEX'S EDUCATION IS UNREALISTIC. THIS IS ESPECIALLY TRUE WHEN ONE CONSIDERS THE UNUSUAL DEMANDS OF THE PARENTS AS IT RELATED TO ASSISTIVE TECHNOLOGY, BACKUP HARDWARE AND DEMANDS OF ADDITIONAL COMPUTER TRAINING FOR A PARAPROFESSIONAL WHO ALREADY MEETS STATE REQUIREMENTS.

THE PROVISION OF A BACK-UP LAPTOP FOR ALEX TO USE WHEN THE EXISTING LAPTOP IS DOWN, IS NOT REQUIRED. THIS IS ESPECIALLY TRUE BECAUSE THE SYSTEM UTILIZED BY THE STUDENT DOES NOT CORRESPOND TO THE SYSTEM USED BY THE DISTRICT, AND SINCE THE LAPTOP IS SOMETIMES ALTERED IN THE HOME AND NEEDS ADJUSTMENTS WHEN IT IS RETURNED TO SCHOOL, THE UNAVAILABILITY OF THE COMPUTER MAY NOT BE THE FAULT OF THE DISTRICT.

MR. SEITZ, THE PARAPROFESSIONAL WHO WORKS WITH ALEX UNDER THE DIRECTION OF THE TEACHER, MEETS THE QUALIFICATIONS FOR HIS POSITION AS DESCRIBED IN R340.1793(c) OF THE MICHIGAN SPECIAL EDUCATION RULES.

THE ONLY EVIDENCE OF PROGRESS WITH ASSISTIVE TECHNOLOGY PROVIDED BY PLAINTIFF WAS A 10-MINUTE VIDEOTAPE OF ALEX WORKING WITH EXISTING TECHNOLOGY. THAT BY ITSELF, ESPECIALLY WHEN ONE CONSIDERS THAT ALEX HAD USED COMPUTERS FOR 10 YEARS, IS NOT CONVINCING EVIDENCE TO SHOW THAT THE LAPTOP SHOULD BE CONSIDERED AS HIS MOST IMPORTANT TEACHING TOOL.

SINCE THE BURDEN OF PROOF WAS ASSIGNED TO PLAINTIFF, AND SINCE THE BURDEN HAS NOT BEEN CARRIED, THE DISTRICT PREVAILS.

RATIONALE FOR THE DECISION ON THE ISSUE OF COMPUTERS AS A PRIMARY LEARNING TOOL:

There was no indication of why parents selected assistive technology as Alex's primary learning tool. Perhaps, Mr. Duncan's training in engineering was part of the decision. At one point, he stated that

Alex had been using a computer since he was 18 months old. During the presentation of plaintiff's case, Mr. Duncan presented a video to show Alex's ability with language software (Write Out Loud (WOL) and Co-Writer). While it appeared that he had some useful knowledge, his performance, because of his impairment, was slow and might not be the appropriate emphasis in a classroom situation.

Mr. Duncan requested that a laptop be provided for Alex's use in school and at home for homework practice. While the District's main instructional computer systems and software are in the MacIntosh format, Mr. Duncan insisted that an IBM-compatible laptop should be provided for Alex because he had had previous experience with that system. New software in the IBM format had to be provided. Teachers trained to use the MAC format now had to learn about the IBM operation.

Mr. Duncan decided that, "Alex needed assistive technology." He mentioned that, "he was not sure who recommended it, whether the schools or the parents, but we decided that the Detroit Institute for Children (DIC) was a good place to get a technology evaluation." (Tr. p. 34) Mrs. Rokicki, Alex's Teacher Consultant (TC), and others participated in the initial evaluation. One of the recommendations was that the Write Out Loud and Co-Writer software would be useful for Alex.

There is an Assistive Technology program that is available through the Oakland County Intermediate School District. While there was some mention about the OCISD program, it is not clear whether Alex was ever evaluated in that setting. Perhaps a diagnostic evaluation by their staff would produce information which would consider all of Alex's needs and disabilities (i.e., physical, visual and intellectual) and then develop a realistic program that meets his educational needs.

CURRICULUM AND ACCOMMODATIONS:

A curriculum for regular and disabled students is developed by teachers and other educational experts. For disabled students, a properly constituted educational team, called the IEPT, meets at least once a year to set programs and to develop goals and objectives which will consider a student's current needs and to provide programs for the hopeful completion of academic goals. Parents are invited to participate in the IEPT. Their input and participation as a member of the Team is encouraged, and success is likely if there is cooperation between home and school.

As the program is implemented, teachers are able to determine if certain accommodations, changes or adaptations are needed to make the educational experience more successful. As an example, teachers have determined that Alex functions better when the material is presented with an auditory, rather than a visual, approach. Other similar adaptations contribute to success in the classroom. When students do not have the ability to respond to tests given to other members of the class, a teacher may limit the number of questions and spelling words in the test. If reading is a problem, the materials may be presented at a lower level, or they may be read to the student by an aide or by a recording. If students are to survive in programs with the non-disabled, those accommodations are

very important. Assistive technology, such as computers, calculators and other devices, may also be helpful in the educational process, but they should not be the main accommodation.

In this particular case, one of the eight annual goals developed by the IEPT was specifically related to the use of assistive technology. While that is a small portion of the IEPT, it turned out to be a major concern for both the parents and the District. There were questions about hardware, software, training, evaluation and training at the DIC, and most frequently about Mr. Duncan's "tampering" with the laptop computer.

The record shows that there are a number of instances where Mr. Duncan made alterations to the laptop which caused problems in the School. This is indicated in a communication to Mrs. Brubaker where Mr. Duncan stated in part, "I was wondering what happened to the file in Word which had all of the Wiggle Works information in it, including the settings. Usually, tech support people do not need to delete user files such as that one." He continued his memo and indicated some of the things he had done to the laptop. "I reset the font size, color and background for each before I confirmed that everything was working O.K. I also organized his Icons into folders with names for their respective functions. For example, you 2-click on the folder 'Alex Read and Write' to get to WOL, Word, and others." (D. Ex. 2, p. 33)

Mr. Duncan tried to clarify the meaning of tampering. He stated that, "In computer terms you have to be careful about changing systems operations. That might be considered as tampering. I have done that on occasion. But I have notified them in writing, and it's in the journal. I have also changed user functions. To give you an example, changing the font size or color of the font are standard changes that should be allowed to occur within an application and of course it could cause a problem with that application, but that just indicates that it's nonfunctional or malfunctioning and needs to be repaired." (Tr. p. 56)

Mr. Mudryk asked if he could briefly respond to the computer tampering issue. He said, "I believe it's irrelevant to this hearing. I mean, we're talking about the child's access, not Mr. Duncan's access, and even if Mr. Duncan was tampering, it's not appropriate to punish the child." (Tr. p. 29) It should be remembered, in some cases, that punishment is provided by Mr. Duncan's tampering.

Mr. Koneval had some concerns about the "most important tool issue." He said that there is a lack of alternatives. "I do not intend to write things down that would imply that it is the only method that he has. I'm perfectly content that the teacher works with Alex directly first, but then his computer becomes his enabler towards independence." (Tr. p. 129) Mr. Koneval also showed concern about the expectation that his staff should periodically go to DIC to learn things they don't know. "I have no objection to that. What I object to is being told to go there on an every week, every month basis." (Tr. p. 127)

The MacIntosh is the basic educational computer in the Birmingham District. Teachers are trained in the use of the system and the software which may be used to enhance the curriculum. Mr. Duncan is an engineer who had used IBM-compatible computers for years. Alex supposedly had used

computers since he was 18 months old. Apparently, his early experience was with the home IBM desktop. Mr. Duncan requested an IBM laptop for Alex to use in school and at home for homework and for weekend work. Mr. Duncan requested a half hour of homework each day and two hours for the weekend.

While it is customary to have an annual IEPT, which usually lasts one hour or less, IEP-type meetings are held for Alex on a monthly basis and are limited, by demand of the District, to 90 minutes per session. The monthly Core Team meetings are used to clarify positions of parties. Each meeting is summarized by Mr. Duncan. A major portion of the minutes are related to assistive technology. At times, however, Mr. Duncan describes specific curriculum expectations as, well as technology demands. (D. Ex. 9) Seven of the core meetings have been completed, and three more are scheduled for this year. In an IEPT meeting, specific participants are required, dependent on the disability area. Frequently, that involves five or fewer participants. In the case of the monthly Core Team meetings, the regular education teacher, paraprofessional, psychologist, social worker, speech pathologist, O.T., P.T. and POHI teacher consultant are expected to attend. (D. Ex. 9, p. 126) Essentially, the IEPT and the 10 core meetings are the equivalent of 11 IEP meetings per year.

In addition, staff members are requested to accompany Mr. Duncan and Alex to frequent training sessions at the D.I.C. In a statement dated 5/16/99, Mr. Duncan suggested that a paraprofessional, who is already qualified under current State rules, "should receive additional training in the operation of the P.C. and all appropriate software needed to execute Alex's assistive technology goals. A minimum of four hours training per month for the 1999-2000 year (D. Ex. 9, pp. 131-132, items f, g, h) were recommended and expected by Mr. Duncan.

It is very clear that plaintiff's views are guided by the technology goal. Alex's Teacher Consultant (Mrs. Rokicki) was asked if, "as a part of the IEP Team she determined that Alex's computer was to be his main learning tool; is that correct?" Mrs. Rokicki responded, "I think that we acted in good faith in trying to meet Mr. and Mrs. Duncan's words about the main learning tool, and we wanted to try to incorporate that to meet Mr. Duncan's comfort level." (Tr. p. 113) When Mr. Koneval was examined by Mr. Mudryk, he was asked if he signed the IEP which recommended that the laptop would be the main learning tool. He was asked to answer yes or no, but was not permitted to elaborate on his position. As this Hearing Officer observed during the testimony, it became clear that the agreement on the importance of the statement was less than unanimous.

A system for communicating with parents was addressed in a letter from eight staff members who would be involved with Alex during the year. It suggested that a notebook would be exchanged daily and notes on Alex's progress would be provided. Parents could ask questions in their reply. In this particular case, the notebook entries were included in the District record. (D. Ex. 2) Eighty-four pages of notes were presented. Roughly 70% of those notes from parents were concerned with the technology goal. In a fax from Mr. Duncan to Mr. Koneval dated 1/21/00, Mr. Duncan listed questions, primarily relating to technology, which he wanted answered. (D. Ex. 9, 166-168) An appropriate response would require the opinions of numerous staff and take many hours to

accomplish. The demands of Mr. Duncan are excessive and could not be replicated for other parents without seriously decreasing other student services.

Mr. Duncan wants the P.C. as a main tool for reading, writing, math and testing. There is diagnostic information provided by educators which suggests that Alex learns best through the auditory approach. Mr. Duncan suggests that tests should be provided in a computer format. The professionals suggest that, "Alex does better on tests which use multiple choice, one-word answers and more concrete information retrieval." (D. Ex. 8, p. 3) Mr. Duncan suggested that physical therapy took time away from academic issues. Rather than adapt to a therapeutic program based on a continuous progression of exercises, Mr. Duncan made arrangements for Alex to receive his treatment in a month long summer program in Poland. There is no question about Mr. Duncan's interests in Alex's academic success. He must realize that he is an engineer with an extensive computer background. He is not a trained teacher and should not be in charge of the instructional process. Educators are trained in diagnostics, curriculum development and therapeutic approaches. Teachers are also trained in the provision of educational accommodations and approaches which lead to improved changes for academic success.

Curriculum is developed by School professionals and administration. The type of program to be provided remains the prerogative and the responsibility of the District. While other approaches and methodologies can be discussed in the IEP meetings, and accepted where possible and feasible, a system that uses unproved methods cannot take precedence.

Mr. Mudryk mentioned that the quality of services mandated must be equivalent to the education of non-handicapped students. Even if the question of providing an IBM laptop and new software are essentially available to Alex only, the amount of staff time requested by parents for the implementation of that one technology goal far exceeds the financial and time commitments for students who are non-disabled.

STATEMENT OF FACTS:

1. Alex Duncan is a student with Cerebral Palsy and visual problems. He is enrolled in the Birmingham Public Schools and is receiving services at the Pembroke School.
2. He is receiving most of his instruction in a categorical classroom. To the extent possible, he is participating in classes with non-disabled students. He receives assistance from a teacher consultant, therapists and a full-time paraprofessional.
3. During the past year, his parents requested that assistive technology, primarily computers, should be his main tool for learning. While accommodating some of the Duncan' suggestions and requests, there was disagreement about the amount and type of involvement.

4. Alex has Cerebral Palsy, a visual problem and is functioning intellectually in the borderline/low average range. While he is in the fourth grade, his reading and math skills are at the first to second grade level.
5. There is a belief that the accommodations to his program are best defined by the teacher who observes him on a daily basis. In some cases, the use of a computer and software can enhance the learning process.

CONCLUSIONS OF LAW:

1. All of the statements of fact, as listed 1-5 above, also apply as conclusions of law in this area.
2. The Superintendent, or his/her designee, of the operating district is responsible for assigning a handicapped student to a program where special education and support services may be provided. In this particular case, there does not seem to be a question about the appropriateness of Alex's program. The main contention centers around the emphasis placed on computer availability. It would be helpful if the assistive technology program located in the Oakland Intermediate School District could evaluate Alex's needs as they apply to his physical and visual disability.
3. The Oakland Intermediate School District is charged with the responsibility to ensure that this decision, or the final decision upon appeal, has been implemented and to so notify the Policy, Planning and Compliance Area of the Michigan Department of Education.
4. This decision shall be implemented in 15 calendar days and remain in force for a period of up to one year. In this case, the main difference lies in the interpretation of whether the computer or the teacher is the most important learning approach for Alex.
5. Any party who is aggrieved by the findings and the decision may appeal to the Department within 25 business days for a State review as provided in R340.1725. An appeal statement, specifying party and issues of disagreement, should be directed to:

Mr. David Brock
Policy, Planning and Compliance
Michigan Department of Education
P.O. Box 30008
Lansing, Michigan

(Alex Duncan Decision)