

STATE OF MICHIGAN

BOARD OF EDUCATION OF THE BIRMINGHAM PUBLIC SCHOOLS

Alan and Liz Duncan, on behalf of their son,
Alex Duncan,
Petitioner,

and

Hearing Officer: Frank J. Wawrzaszek

**Board of Education
of the Birmingham Public Schools**,
Respondents.

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PETITIONER'S STATEMENT OF POSITION

Introduction and Procedural Background

Petitioners, the parents of an 11 year-old student with cerebral palsy, requested a Due Process Hearing in this case to address related services issues decided in a November 1999 IEP. The main contention in this case is the student's access to a personal computer (PC).

On May 13, 1999, an IEP Meeting was held to discuss the 1999-2000 year plan. Many items remained needing decisions from Mr. C. Koneval, the Director of Student

Support Services. On September 9, 1999, the IEP was reconvened with a full team of school staff. Again, the same issues required resolution from Mr. Koneval's office since they could not be resolved at the meeting. Mr. Koneval finally completed his position in a letter in Exhibit A, at 12-15¹.

On November 11, 1999, the parents signed the IEP, which proposed the following objectives, among others:

- Alex will use a portable laptop as his main learning tool for activities involving reading, writing, math and test taking
- Alex will independently use his laptop as his main learning tool for activities involving reading, writing, math and test taking

Id. at 5. The IEP also provided:

The laptop will be utilized to enhance and maximize Alex's academic progress in all areas of the curriculum. Software programs, including Wiggleworks, will be utilized to maximize his learning. Parents request homework each night as well as on the weekend. Homework should be independently accessible by Alex (the appropriate software, tools, materials). Social Studies and Science curriculum units of instruction will be broken down and made accessible through assistive technology, when appropriate, with specific goals.

Id. at 9.

The parents filed a Dissenting Report, *id.* at 11, and requested a Due Process Hearing based on the issues in that report since the school district has shown its reluctance to provide the student with full access to the PC. Although Mr. Duncan initiated a request to Mr. Koneval to consider solving the concern through mediation, Mr. Koneval rejected Mr. Duncan's proposed mediation service and has failed to provide the parents with further information on his suggested mediator.

¹ Petitioners will refer to exhibits listed on their Witness and Exhibit List. However, pursuant to the

Statement of Issues

The issues to be decided in this hearing are:

1. Whether the IEP should provide for the student's unrestricted access to the personal computer (PC).
 - a. Whether the IEP should provide for the PC to be used in the student's home.
 - b. Whether the IEP should require provisions for a backup laptop that can be properly positioned on the student's tray system to assure access, visibility, and minimized fatigue levels, in the event of failure of the PC.
 - c. Whether the IEP should specify maximum out-of-service downtime of the PC at which time use of the backup is implemented.
2. Whether the IEP should require the school district to purchase appropriate software assuring equal opportunity of access afforded to the non-disabled students at Pembroke.
3. Whether the IEP should define and require implementation of an appropriate training plan for Alex's health care parapro.
4. Whether the IEP should specify a clear commitment to the Curriculum Adaptation needed to meet Alex's present reading level.

Facts

Alex T. Duncan was born on July 27, 1988 with cerebral palsy (CP) and is a spastic quadriplegic. *See* Exhibit B. His birth mother arranged for Alex to be available for adoption at birth through the Catholic Social Services. After several months with temporary caregivers, Liz and Alan Duncan adopted him; Alex is currently their only child.

Alex cannot walk without significant assistance and has limited use of his left hand and even less function in his right hand. For the most part, Alex is taken from one location to another in a manual wheel chair since his right hand does not have sufficient function to move the chair.

Alex has limited vision but can see letters on his personal computer (PC) when the font is about 36 points in size (normal-sized font is approximately 12 points). Alex can speak and carry on a limited conversation but does require repeating of some words. When asked, he can adjust his speech and make it clearer.

In general, Alex has a pleasant disposition and appears quite happy and polite. He is a sociable child, has many friends, and in general gets along with the other kids at school. He is currently in the 4th grade at Pembroke. Academically, Alex is about at a beginning second grade level (based on a May 1999 teacher report) for reading and writing. He is just above the 1st grade level for math.

Alex started using an IBM-compatible PC when he was 18 months old and has always shown an interest in computer technology; his strength is his ability to use assistive technology. Based largely on the results of an Assistive Technology Assessment performed by the Detroit Institute for Children (DIC) on August 22, 1998 (*see Exhibit B*), just before Alex started at Pembroke, the Birmingham Public Schools purchased an IBM compatible laptop PC. The PC has been assigned to Alex for his exclusive use while at school and goes with him to classes as needed. Most of his PC work is performed in the BASIC Special Education Classroom for reading, writing, math, and test taking. Alex goes to regular classes for Spanish, Social Studies, and Science.

Exhibit F is a short video showing Alex's skill level using his assigned PC. As the video demonstrates, Alex is able to start up the software independently and proceed to create and enter the information he has decided to write about. This creative writing task is challenging for Alex since he must decide what to write and sometimes chooses words not in his present writing vocabulary. Alex uses his left hand only to enter text mainly with his second finger. He can adeptly make mouse point-and-click menu selections using a touch pad in the center of the keyboard, again with his left hand. To enable Alex to complete his assignments timely, he needs software and hardware that will minimize the effort he is required to expend. The DIC report in Exhibit A resulted in recommendations for software and hardware features to meet those needs.

As demonstrated on the videotape, Alex turns on the Caps-Lock with a stroke—for J in John, for example—and then will turn it off with another stroke after J is entered. This activity requires three key strokes to get a capital letter: 1 for caps on, 1 to type the capital letter, and 1 for caps off. There is a feature that was implemented earlier this year, based on use by Specialists in Assistive Technology at DIC, called "sticky keys." Sticky keys allows one stroke of the shift key to capitalize the next key stroke and returns automatically to lower case, thus only needing 2 strokes for a capital letter. These types of features are instrumental in helping Alex to reach his potential. However, in the present case, the district has disabled this feature as a result of its hardware maintenance.

At one point in the video, Alex's right hand is placed where he can grab on to an edge and help support himself while typing. It is the role of the parapro to recognize that Alex should be repositioned; the parapro must be trained to act accordingly. Every small

adjustment helps reduce the fatigue level and increase the amount of time Alex can stay on the required task.

Alex uses two pieces of software: (1) a word prediction program called Co-Writer (CoW) to help predict words after he types only a few starting letters, and (2) speak-what-is-typed word processor, Write-out-Load (WOL) for viewing, saving, and retrieving text. Alex must maneuver between the two programs. The video also demonstrates that Alex has some difficulty keeping his head lifted so he can alternately view the keyboard for letter choices and then view the screen to check his typing and select word choices from a word prediction program. Alex's difficulty points out the importance of correct positioning as well as the angle of the keyboard and of the viewing screen so his access will require the minimum effort.

In addition to the software, as can be seen in the video, Alex's PC is inserted into a positioning tray which puts the keyboard at the optimum angle as determined by a DIC evaluation. Additionally, the screen is positioned at the correct angle and distance from the eye so the letters are at the best size and position to for Alex to read with minimum fatigue level.

The process of procuring the tray system and insuring that it would be set up for optimum use, flexibility, and mobility took approximately 10 months and was the result of input from school district therapists, Alex's physician, specialists at DIC, and a vendor. The result is a balanced system that stores, transports for in-class use, and positions the PC for best use as well as doubles for a work surface when the PC is not in use. Since Alex is being taught to be efficient with a certain layout of the keys, access to the mouse

using a touch pad, and properly positioned keyboard and display, the layout must be provided for him at all times to assure his potential is maximized.

However, these needs have not been met. The IEP Comments section defines how the staff will have access to the PC but make no provision to guarantee that Alex will be given access in any measurable way. The result is the opportunity for the school to arbitrarily restrict and deny access as it sees fit, which is exactly what has happened. Although Alex had been allowed to bring the PC home until the parents requested this Due Process Hearing, Mr. Koneval has instructed that the PC will not be sent home until after this hearing. His reasons, set forth in Exhibit C, are that the machine had some settings changed which made it inoperable for Alex's use. The truth of these allegations is not substantiated. Mr. Koneval's actions deny Alex access to this PC at home.

Argument

I. The IEP should provide for the student's unrestricted access to the PC.

Although the IEP recognizes the necessity of Alex's use of the PC, it fails to state where he may use it and to give him unrestricted access to it. Perhaps in part because of that failure, the school district has restricted access for Alex to take the PC home since November unless formal homework was assigned by the teacher and have stopped sending it home at all since 1-18-2000 as stated in Exhibit C. The IEP should be changed to provide for Alex's unrestricted access to the PC, including the following: (1) Alex's use of the PC at home; (2) provisions for a backup laptop that can be properly positioned on Alex's tray system to assure access, visibility, and minimized fatigue levels, in the

event of failure of the PC; and (3) specifics of maximum out-of-service downtime of the PC at which time use of the backup is implemented.

The IEP must contain a statement of the related services that the local educational agency will provide. 20 USC 1414(d)(1)(A)(iii). The IEP must also contain a statement of “the projected date for the beginning of the services and modifications described in clause (iii), and the anticipated frequency, **location**, and duration of those services and modifications.” 20 USC 1414(d)(1)(A)(iv)(emphasis added). In addition, “[o]n a case-by-case basis, the use of school-purchased assistive technology devices in a child’s home or in other settings is required if the child’s IEP team determines that the child needs access to those devices in order to receive FAPE.” 34 CFR 300.308(b).

The IEP’s failure to state the location, duration, and frequency of the provision for the PC is a violation of the statute. Moreover, despite the IEP’s recognition that “[h]omework should be independently accessible by Alex (the appropriate software, tools, materials),” (Exhibit A at 9), the IEP does not specify that Alex should have access to the assistive technology at home, in violation of the federal regulation.

Since Alex needs access at all times to his PC to receive FAPE, provisions must be made for a backup system in the event that Alex’s PC is taken out of service for an extended period of time for whatever reason. The backup system must provide for proper positioning in Alex’s support tray and have a sufficient size screen so that Alex can see without strain. The system must be portable to go to classes and to home for homework. The backup PC must meet the same specifications as the main PC now in service with no compromises. Additionally, the backup system would provide a means for the school staff to get in-service training without denying Alex use of his PC at home.

To determine when backup should be in place, Petitioners propose the following. If the PC is out of service for up to 3 days due to malfunction, the backup PC should be provided for Alex's use. If more than two malfunction disruption incidents occur in any given month, the backup PC should be made available within 1 day of being out of service, for the following two months, at the end of which, the 3 day rule should again apply.

Staff use for in-service training should be preformed mainly on stationary PC's that are available in the Basic Classroom. If Alex's PC is needed for in-service training because of some feature unique to the PC, it would be allowable for it to be out-of-service a maximum of one day and/or evening per month.

If the PC is needed for such things as software installation, this activity should be coordinated during the day while Alex is in mainstream class for subjects where the PC is not used or at recess. Thus, there should be no lack of access due to software installation. Additionally, at the parents' discretion, Petitioners would be open to make the PC available for several days straight when they can determine that due to vacations or other events they know Alex will not require use of the PC.

II. The IEP should require the school district to purchase appropriate software assuring equal opportunity of access afforded to the non-disabled students at Pembroke.

The IEP identifies WiggleWorks software as an appropriate software to aid Alex in his reading and writing. (Exhibit A at 9). This software, in its entirety, is available to all students at Pembroke as a supplemental reading aid. Additionally, a test taking quiz feature is available on the PC's used in the non-disabled students' classrooms.

Alex's right to have access to the same quality of software as non-disabled students violates 34 CFR 104.33, which states: "For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met."

Alex has been given access to only a subset of the full WiggleWorks software because his PC will require an additional investment in software to gain access to all the Wiggleworks reading books and tests. To provide Alex with an equal opportunity to the non-disabled classroom students, the school district should be required to complete the purchase of the full Wiggleworks and related test taking software for access on Alex's PC.

III. The IEP should define and require implementation of an appropriate training plan for Alex's health care parapro.

20 USC 1412(a)(15)(B)(iii) provides that personnel standards must:

allow paraprofessionals and assistants who are appropriately trained and supervised, in accordance with State law, regulations, or written policy, in meeting the requirements of this part [20 USC 1411 et seq.] to be used to assist in the provision of special education and related services to children with disabilities under this part [20 USC 1411 et seq.].

In the present case, a clear commitment in the IEP to a training program for the parapro is needed.

Petitioners have only been able to get partial records to substantiate any training of the parapro or his qualifications. Petitioners propose that two hours per month of training for the parapro be provided by a trainer qualified to aid Alex's special needs for working with his main learning tool, the PC. In addition, the parapro should be able to go

with Alex to his computer access training sessions at the DIC where a qualified assistive technology expert assesses Alex's progress and recommends improvements. *See* Exhibit B for typical DIC assessment and recommendations.

IV. The IEP should specify a clear commitment to the Curriculum Adaptation needed to meet Alex's present reading level.

The IEPC states: "Curriculum adaptation **may** follow the social studies example detailed below." (Exhibit A at 14, emphasis added) Although Petitioners are agreeable to a form of the statement that allows flexibility, the word, "shall" should be substituted for the word, "may." To date, the school has put forth no alternate adaptation plan and, on several occasions, homework from substitute teachers was sent home with Alex that came straight from the regular 4th grade assignments with no apparent adaptation at all.

V. Petitioners are entitled to an award of attorney fees.

A prevailing parent in an action or proceeding under IDEA is entitled to an award of reasonable attorney fees. 20 USC 1415. An IDEA impartial due process hearing initiated pursuant to 20 USC 1415 and the corresponding implementing regulations, 34 CFR 300.506-300.515 is an "action or proceeding" brought under § 1415 and parents who prevail in such hearings are thus entitled to attorney fees. *Eggers v Bullitt County School District*, 854 F2d 892 (6th Cir 1988)). In the event that the Hearing Officer rules in Petitioners' favor, they request an award of reasonable attorney fees.

Conclusion

For the reasons stated above, Petitioners request that this tribunal issue an award holding: (1) the IEP should provide for the student's unrestricted access to the personal computer (PC), including (a) the IEP should provide for the PC to be used in the student's home, (b) the IEP should require provisions for a backup laptop that can be properly positioned on the student's tray system to assure access, visibility, and minimized fatigue levels, in the event of failure of the PC, and (c) the IEP should specify maximum out-of-service downtime of the PC at which time use of the backup is implemented; (2) the IEP should require the school district to purchase appropriate software assuring equal opportunity of access afforded to the non-disabled students at Pembroke; (3) the IEP should define and require implementation of an appropriate training plan for Alex's health care parapro; and (4) the IEP should specify a clear commitment to the Curriculum Adaptation needed to meet Alex's present reading level.

Respectfully Submitted,

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