IOWA STATE BOARD
OF EDUCATION
(Cite as 9 D.o.E. App. Dec. 22)

In re Sumer Myers	:	
Carol S. Myers, Appellant,	:	
v.	:	DECISION
Central City Community School District, Appellee.	:	[Admin. Doc. #3096]

The above-captioned matter was heard on June 17, 1991, before a hearing panel comprising Mary Jo Bruett, information specialist, Bureau of Planning, Research and Evaluation; Colleen McClanahan, consultant, Bureau of Federal School Improvement; and Kathy Collins, legal consultant and designated administrative law judge. Appellant was present in person and was represented by Robert G. Tully, Verne Lawyer & Associates, Des Moines. Appellee Central City Community School District [hereafter the District] was present in the person of Superintendent William Newman and was represented by Steven K. Warbasse, Warbasse & Roush, P.C., Cedar Rapids.

An evidentiary hearing was held pursuant to departmental procedures found at 281 Iowa Administrative Code 6. Appellant timely appealed a decision of the board of directors [hereafter the Board] of the District made on November 21, 1990, denying reimbursement or payment of tuition costs for Appellant's daughter, Sumer, to attend Kirkwood Community College in lieu of the District's high school. Jurisdiction for the appeal is found at Iowa Code chapter 290.

I.
Findings of Fact

The administrative law judge finds that she and the State Board of Education have jurisdiction over the parties and subject matter of the instant case.

Appellant is the mother of four children (Sumer is the eldest) and is employed through a contract with Center Point Community School District to coordinate and instruct in the Talented and Gifted ("TAG") student programs at four different schools, including schools in the District. Her husband is self-employed with a seasonal, uncertain annual income.

Sumer Myers is 15 years old and chronologically would have just concluded her ninth grade year in the District. She was enrolled and attended there through eighth grade. Appellant characterized her daughter as always having been mature for her age, outgoing, and responsible, setting and achieving her own goals for herself. When Sumer was in first grade, her teacher indicated to Appellant that she felt certain Sumer would qualify for the District's TAG program ("Project Stretch") which was

available for fourth through eighth grade students who qualified.[1] Sumer did indeed qualify, having ITBS[2] scores two years above grade level and cognitive ability test scores above 120. She achieved excellent grades throughout elementary school, and was recognized by awards in science, social studies, and music.

Sumer's fifth grade teacher told Appellant early in the year that Sumer had already mastered the material to be covered that year, but she created opportunities for Sumer to pursue additional learning experiences and when those were complete, let Sumer play the piano. She was not given the same level of academic attention in sixth through eighth grade, according to Appellant, despite the fact that Project Stretch encompassed those grades. However, she was chosen by the District choir director to accompany the middle and high school choirs on piano, and this delighted her. By the middle of sixth grade Sumer was essentially bored with school and her frustration only increased the next two years. She did not perform academically up to expectations during this period. In eighth grade she participated in the Iowa Talent Search program operated by Iowa State University, apparently for TAG children who score in the top three percent on ITBS or other nationally normed tests. In February of eighth grade, Sumer took the ACT test -- generally taken by college-bound seniors -- and her composite score was 21.

Sumer's first love and self-proclaimed "passion" is music. Her career ambition is to become a concert pianist, but she plans to pursue a degree in music education so that she can also teach. Sumer is talented on piano and saxophone, as well as vocally.

In seventh grade Sumer looked into dropping out of school, and when she asked school officials about this possibility, she learned that she could not drop out, take a GED and proceed to college. First, she was still of compulsory attendance age so she couldn't drop out. Second, one has to be 18 in Iowa to test for a GED, and the diploma awarded upon passing is not given to the student until his or her chronological class has graduated from high school.[3] Nevertheless, at that point the seed was planted, so to speak, that Sumer might accelerate her education by early enrollment in college.

Sumer attended the District's high school orientation program at the end of eighth grade and then sought out school officials to determine if there were TAG or enrichment opportunities within the high school curriculum. She was told she would be required to take the same courses as all ninth grade students, but could exercise some control over her high school education in the area of electives; there was no TAG program *per se* at the high school at that time.

At some point that spring or early summer, Appellant and her daughter inquired of Kirkwood Community College whether Sumer could take courses[4] there before school started in the fall; they were told that she could.

---

[1] Multiple criteria are used by the District to identify TAG children.

[2] Iowa Tests of Basic Skills

[3] *See* Iowa Code §259A.2; 281 IAC 32.

[4] The inquiry concerned algebra and music.

Rhonda Kekke at Kirkwood suggested that Sumer audition the following Saturday for scholarships awarded by the music department of the college. She auditioned and was awarded a $250 scholarship, the maximum available, applicable to fall 1990 tuition.

The decision was made to enroll Sumer at Kirkwood that summer for the dual purpose of determining how she, at age 14, would adjust socially and academically to the college environment. Her ACT score qualified her to take all college-level courses except mathematics. (She would be required to take beginning or intermediate algebra before she could take math courses that would apply to the college's two-year degree (Associate of Arts, or AA).) Sumer enrolled in beginning algebra, music appreciation, applied music-piano, and jazz improvisation clinic. After two weeks, Sumer personally approached her algebra instructor and the department chair in mathematics complaining that she had yet to learn anything new and "this is what I came to Kirkwood to get away from." Appellant's Exhibit 7 at p. 2. She was advised to drop the class and was assigned a math tutor who would instruct her through both beginning and intermediate algebra for the purpose of taking a placement test that would enable her to take regular math courses for college credit. Sumer's grades for six hours in the summer of 1990 were five hours of A and one hour of B.

She enrolled in the fall of 1990, applying the $250 music scholarship to her tuition bill, and took Music Theory I, Aural Skills I, Jazz Improvisation I, piano, saxophone, concert choir, (instrumental) jazz ensemble, American government, and jazz transit (vocal) for a total of 15 semester hours. (She continued her algebra tutoring independently.) She received a grade of B in government, saxophone, and Jazz Improvisation I; all other grades were As.

In spring semester 1990, Sumer was enrolled in 22 semester hours: 8 hours of language arts (college writing, and fundamentals of communication), and 14 hours of various academic and performance courses in music. She received a C and a B in her language arts classes, but in all music courses she received As. She has been on the Dean's List all year, and currently holds a 3.5 GPA. Appellant's Exhibit 15. She is present at school from approximately 6:30 a.m. to approximately 5 p.m. Of course Sumer has to rely on others for transportation. She is not yet old enough to get a drivers license.

Sumer is unsure of her educational future. She would like to finish an AA degree at Kirkwood,[5] then pursue a BA or BS elsewhere. Julliard or Eastman would be ideal, assuming she could pass the auditions, but the University of Iowa is also a possibility for her. A great deal depends upon her ability to obtain scholarships and loans because her parents are not currently in a financial position to put her through unassisted. Sumer's ability to qualify for financial assistance has been limited due to the fact that many college loan programs (PELL grants, Iowa tuition grants, and government-insured student loans, for example) require a high school diploma or a GED as a threshold criterion to qualify. Appellant's

---

[5] Her music professor wrote that Sumer should be able to complete her AA degree in Spring 1992 with a music major, and just three courses short of an additional major in education, with "92 semester hours of credit -- 30 more than the 62 required to graduate." Appellant's Exhibit 20.

Exhibit 7 at p. 2. Sumer's only reason for obtaining a high school diploma at this point would be to become eligible for financial assistance.

Appellant and Sumer initially sought the support of high school principal Jim Hamilton for Sumer's attendance at Kirkwood. Mr. Hamilton and middle school principal Kirk Ketelsen joined Appellant (in her role of TAG teacher) in writing a letter in support of Sumer's enrollment at Kirkwood that summer. Appellant's Exhibit 1. Thus, District officials were aware of Sumer's plans and supportive to the extent of urging she be accepted at Kirkwood. However, when Appellant approached Superintendent Newman in mid-summer 1990 seeking help from the District for Sumer's tuition, he referred her to the Board as the District lacked any kind of policy in this area for him to apply in making a decision. Appellant made her initial request to the Board in August, 1990. The Board asked for a month to think about it.

Superintendent Newman had, at one point, agreed to provide a letter to Kirkwood to the effect that the District couldn't really meet Sumer's programming needs in music, or at least could not offer the same range of courses in music. However, what was apparently needed was a letter from Dr. Newman to Kirkwood to the effect that the District was unable to meet Sumer's educational needs in general. This he was unwilling to state. Appellant believes that such a letter would have been the basis for Kirkwood to have waived the tuition for Sumer, but there was no documentation or corroborating testimony of this assertion at hearing.

Superintendent Newman gave Appellant additional opportunities to address the Board in support of her request, and met with her personally on several occasions. Ultimately, however, he recommended against the District's payment of Sumer's tuition. In November, a motion by Board President William Henderson to contract with Kirkwood Community College for the educational costs of Sumer Myers' tuition failed 1-3 (with Henderson voting nay). Previous Record, Board Minutes of November 21, 1990, at p. 1.

The basis for Superintendent Newman's recommendation included his concern for Sumer's social adjustment (he was not totally satisfied with the evidence of her acclimation at Kirkwood), his belief that she should have at least tried high school first before rejecting it, his fear that approval would set a precedent, the fact that the District was successfully educating other TAG students, and a belief that college costs should be borne by a student and his or her parents.[6]

With respect to the District's high school TAG opportunities, the Board adopted a policy in July of 1989 stating its recognition of the

---

[6] At hearing Dr. Newman also introduced evidence -- not available at the time the Board made its decision -- that a comprehensive evaluation should precede any "extreme acceleration" of a gifted student's academic program. See Appellee's Exhibit C (letter from Professor Nicholas Colangelo of the Connie Belin National Center for Gifted Education in Iowa City). As Sumer had not been given such an evaluation, Dr. Newman would also be reluctant to support her college enrollment until she was tested and evaluators were satisfied that the results indicated such acceleration would be advisable for her.

qualitatively differentiated program needs of some (TAG) students beyond regular programming. The policy also directed Dr. Newman to develop a TAG program and regulations to identify qualified students, to evaluate the program, and to train District personnel. Appellee's Exhibit A (Board Policy #5025). A District committee created Appellee's Exhibit B, a document entitled, "Providing for Gifted Students at Central City High School" and finalized it in the winter of 1990-91. It has been accepted by the Board, but had not yet been implemented. The District's plan for a "differentiated educational program" calls for the development of a curriculum designed to meet the needs of students that "cannot be properly nurtured solely in the regular classroom setting." Appellee's Exhibit B at p. 2. The alternatives currently proposed and accepted by the Board include enrichment activities, special class placement, and independent study. Id. at p. 3. The items specified in the delivery of the adapted educational experience for TAG students include "early college enrollment" as well as "summer college courses, institutes, or programs for gifted learners." Id. Presumably because of the training of staff necessary to fulfill the plan, it had not yet been implemented at the high school at the time of this hearing.

Dr. Newman testified that the District has used the additional allowable growth funding option for its TAG programs. See Iowa Code §§442.31-.36.

Other facts worth noting include the District's admission that its 1990-91 enrollment count included Sumer Myers, despite the fact that she was not in attendance and may technically not even have been enrolled, and the cost of Sumer's tuition at Kirkwood. It appears to be $1184 per semester, exclusive of fees and books. Summer school tuition for six hours was $333. See Appellant's Exhibit 21. By counting her in the fall of 1990, the District stood to receive approximately $2261 in state aid to educate Sumer Myers, which of course it did not do.

II.
Conclusions of Law

The issue in this case is, broadly, whether or not the District abused its discretion in denying Appellant's request for the payment of Sumer's tuition to (or a contract for the same with) Kirkwood Community College.[7]

From Appellant's perspective, this is a clear case of an unmet need within a local school district. She argues that the District's unwillingness to recognize its inability to meet Sumer's needs through traditional means, and its refusal to approve nontraditional means, is an abuse of discretion. To some extent Appellant sees this case turning on

---

[7] The standard of review adopted by the State Board of Education for application in appeals from local school board decisions is de novo -- looking at the issue "anew." However, we will not overturn a local board decision absent proof (and the burden is, of course, on Appellant) that the decision was made "arbitrarily, capriciously, without basis in fact, upon error of law, without legal authority, . . . or unless it constitutes an abuse of discretion." In re Jerry Eaton, 7 D.o.E. App. Dec. 137, 141 (1989).

the validity and applicability of the concept of accelerated programming for TAG students. Although we disagree with Appellant that this is what the case is about, we wish to establish that we accept the position of Dr. Camilla P. Benbow of Iowa State University, to the degree that she advocates accelerative programs for certain talented or gifted children. See Appellant's Exhibit 4.

From the District's perspective, this is an equally clear case where school officials were essentially disenfranchised from the decision making process in regard to this young woman's education, were presented with a fait accompli, and were offered no alternative but to pay the costs of Appellant's choice, or refuse.

In contrast, the hearing panel sees this case as representing a classic lack of communication, and a clear example of each party being 90 percent wrong and 90 percent right.

Unlike the Individuals with Disabilities Education Act (IDEA, formerly Education of All Handicapped Children Act, P.L. 94-142, commonly referred to as "special education"), Congress has done very little in the area of gifted and talented education. Instead of mandating delivery of specialized TAG services, encouragement, limited funding, and an offer of technical assistance were essentially all that came of the federal Gifted and Talented Children's Education Assistance Act of 1969, or subsequent acts passed in 1974 and 1978. Zirkel and Stevens, "The Law Concerning Public Education of Gifted Students," 34 Ed.Law Rep. 353 (1986). The delivery issue and level of commitment has been left to states.

Pennsylvania, itself a leader in the concept of educating children with learning or educationally limiting disabilities, has a statutory scheme for assuring TAG-identified students have the same rights as traditional special education students. All of these children are defined as "exceptional" under state law. Naturally, judicial decisions have resulted from due process appeals brought by parents such as Appellant who desire the best for their children. See e.g., Gateway School Dist. v. Commonwealth Dept. of Educ., 559 A.2d 118 (Pa.Comm. 1989); Centennial School Dist. v. Commonwealth Dept. of Educ., 539 A.2d 785 (Pa. 1988); Scott S. v. Commonwealth Dept. of Educ., 512 A.2d 790 (Pa. Comm. 1986). Despite having the special education "model," including an IEP requirement for TAG students, Pennsylvania still has its share of issues being litigated. Therefore, even having a specific state law on the subject does not answer all questions or satisfy all parents and school districts. The absence of a specific and precisely defined law leaves us essentially in no worse a position than the education officials in Pennsylvania.

In Iowa there are only a few statutes dealing with educational services to gifted or talented students. There is a statute authorizing the creation of advisory counsels for the education of TAG students and prescribing its duties should one be created. See Iowa Code §§442.40-.41 (1991). There is a provision requiring area education agencies to "encourage and assist school districts . . . to establish programs for gifted and talented children." Id. at §273.2. There is a statute creating the National Center for Gifted Education at the University of Iowa. Id. at §263.8A. And there is a series of Code sections authorizing a public school district to use additional allowable growth to fund its TAG programs, provided the criteria in the statute are followed. Iowa Code §§442.31-.36 (1991).

More to the specific point at issue here, there is an accreditation standard in the Code of Iowa requiring TAG programs:

> . . . The rules adopted by the state board . . . to establish new standards shall satisfy the requirements of this section. . . . The educational program shall be as follows:
> . . .
> 7. Programs that meet the needs of each of the following:
> . . .
> b. Gifted and talented pupils.
> . . .

Iowa Code §256.11(7)(1991).

The provision of some form of gifted and talented education is therefore mandatory for all Iowa public schools (and those private schools seeking state accreditation). The department's implementing regulation for TAG programs reads as follows:

> The board shall have a program to meet the needs of gifted and talented students. The program shall include valid and systematic procedures, employing multiple criteria, for identifying gifted and talented students including ethnic and language diverse students if such students are enrolled; provisions for curricular programming to meet the needs of identified gifted and talented students; support services, including materials and staff, to ensure that a qualitatively differentiated program is provided; and a procedure for annual review and evaluation for the purpose of program improvement.

281 IAC 12.5(12)(School accreditation standards).[8] This requirement does not specify that such programming is to be provided for kindergarten children through high school seniors; rather the emphasis is on meeting the individual needs of identified children regardless of age or grade level, by providing a full complement of programs for all identified students. Clearly the statute and rule provide a lot of room for creative implementation. It is definitely not overly prescriptive. That has been the traditional approach of both the legislature and the department of education: provide the skeletal framework of a program and let the local districts flesh it out.

---

[8] The school standards became effective on July 1, 1989. However, the department viewed this particular standard and one related to programs for at-risk students as "developmental" in nature. In recognition of the fact that it takes time to create a quality comprehensive program, the department issued a three-year implementation schedule for TAG and at-risk programs, requiring a plan by July 1, 1989, and full implementation by July 1, 1992. However, we also issued a caveat that in the interim the needs of identified students must be met on an individual basis.

We hope the standard is defined well enough to provide a foundation upon which school districts can devise and implement their own programs to meet the needs of TAG students. On its face, the District's plan appears to meet the criteria within the standard; of course, the proof is always in the pudding.

We cannot fault Appellant for pursuing what she believes is the best educational path for Sumer. Her parental views may also be worthy of additional weight by virtue of her training and professional employment. However, what Appellant failed to do is work with the available tools within the system. She and Sumer rejected the District's high school programming out-of-hand; they made a unilateral decision to pursue a relatively radical, nontraditional path; and then turned to the District with a bill in hand asking for its blessing and its dollars. Whatever validly charitable feelings school officials or the Board may have had were likely understandably counterbalanced by feelings of disenfranchisement.

What could Appellant have done differently? She could have investigated neighboring districts' TAG programs. If she found a district or school willing and able to devise an individualized program for Sumer (with or without college courses) she could have exercised her right to file for open enrollment. Parental choice is at the heart of the open enrollment law. See Iowa Code §282.18 (1991).

Another avenue she could have pursued following Sumer's sophomore year is the Postsecondary Enrollment Options Act, which would have allowed Sumer the opportunity to take college courses, not available at her resident school district, at the expense of the District. See Iowa Code chapter 261C (1991).[9] This would have required Sumer to continue her education in the District for two more years, but would have enabled her to take all of the music courses she has taken and plans to take, and perhaps others as well, at no personal expense.

On the District's side, it is easy to see in retrospect that District officials, particularly the high school principal, guidance counselor, and TAG coordinator, could have proposed a modified high school program for Sumer. This could entail identifying a combination of high school course offerings and independent study, and perhaps transporting her to Kirkwood for part of her day. Or, in the alternative, they could have suggested a practice called curriculum compacting where she would be able to graduate in one to three years,[10] and the District would agree to assume the costs of her second, third, or fourth year of "high school" at Kirkwood. This could have been worked out between the parties and staff from the two schools.

---

[9] The Postsecondary Enrollment Options Act is currently limited to eleventh and twelfth grade pupils. Iowa Code §261C.2 (1991). There is also the limitation that "a comparable course must not be offered by the school district . . . in which the pupil is enrolled." Id. at §261C.4. Thus, courses such as American government and perhaps fundamentals of communication would not have been available to her, but the bill for all of the other courses she has taken would have been paid by the District pursuant to law.

[10] The school accreditation standards also require the adoption of an early graduation policy. See 281 IAC 12.3(7).

The point is, compromises and alternatives were and are available to resolve this situation; communication and open minds are prerequisites. If Appellant and Sumer will only be satisfied with full-time college attendance, and the District is unwilling to move from its current posture on the issue, Appellant is obliged to lie in the bed she selected and made, and to pay for it as well. The panel believed the testimony of Superintendent Newman who stated that part of his and the Board's resistance to Appellant's request stemmed from the fact that she would entertain no alternatives to a college education for Sumer. If Appellant were to rethink her position and be willing to consider modification of the track on which Sumer is traveling, she might find the District willing to negotiate. By the same token, the District needs to continue to recognize its own limitations in terms of being qualified as the exclusive provider for educational programming for all students, especially those in the top three to five percent of the population of this country.[11]

As stated earlier, we do not make a habit of reversing local board actions in the absence of proof of arbitrary decision making or similarly flawed use of discretion. We recognize, as did Superintendent Newman, that the decision to pay none, some, or all of Sumer's college tuition was open to the Board. Sufficient reasons were propounded for his recommendation, and the Board's ultimate decision, to refute an allegation of arbitrariness. No other ground for reversal was urged, and in our view none is applicable. We will not substitute our judgment for the local Board's on this issue, under the circumstances of this case.

Having no legal basis upon which to reverse the Board's decision, we affirm. However we strongly encourage, even urge, the parties or their representatives to return to negotiations, and hope both will take a more win-win approach to the problem -- for Sumer's sake and to her benefit.

Any motions or objections not previously ruled upon are hereby denied and overruled.

III.
Decision

For the foregoing reasons, the decision of the Central City board of directors made on November 21, 1990, denying reimbursement or payment of tuition of costs for Sumer Myers to attend Kirkwood Community College in lieu of the District's high school, is hereby affirmed. Appeal dismissed. Costs of this action, if any, are hereby assigned to Appellant under Iowa Code §290.4 (1991).

8-15-91
DATE

Ron M. McGauvran
RON McGAUVRAN, PRESIDENT
STATE BOARD OF EDUCATION

August 7, 1991
DATE

Kathy L. Collins
KATHY L. COLLINS, J.D.
ADMINISTRATIVE LAW JUDGE

---

[11] J. Zettel, "The Education of Gifted and Talented Children From a Federal Perspective," in Special Education in America: Its Legal and Governmental Foundations, 51, 56.