

IOWA DEPARTMENT OF EDUCATION

(Cite as 18 D.o.E. App. Dec. 26)

IN RE: TONY B.

Winterset Community School
District and Heartland AEA 11,
Appellants

V.

Ray and Barbara B,
AppelleesHEARING DECISION
DOC# SE -218

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The above entitled matter was heard by Administrative Law Judge Carl R. Smith on November 19, 1999 in Winterset, Iowa. The hearing was held pursuant to Iowa Code 281.6 of the Rules of the Iowa Department of Education found in Iowa Administrative Code Section 281.6 and the Rules of the Iowa Department of Education (281-41.32 and the applicable regulations found within the Individuals with Disabilities Act (IDEA).

The Appellants in this matter were represented by Attorney Andrew Bracken from Des Moines, Iowa. The Appellees in this matter did not attend the proceedings and were not represented.

This Hearing was limited in scope to the issue of whether the ALJ should rule in favor of allowing the Winterset School District and Heartland Area Education Agency to proceed with a comprehensive evaluation of Tony B., a second grader who is enrolled as a student in the Winterset School District.

According to the Iowa Rules of Special Education (1995) the process by which a public agency can proceed with an evaluation without parental consent is described in the following manner:

- c. A public agency may use the hearing procedures to determine if the individual may be evaluated or initially provided special education and related services without parental consent. If the public agency does so and the

administrative law judge upholds the agency, the agency may evaluate or initially provide special education and related services without the parent's consent.

In these proceedings the District and Heartland Area Education Agency are contending that Ton B.'s best interests will be best served if they are permitted to initiate a comprehensive evaluation of him.

I. Finding of Fact

The administrative Law Judge finds that he and the State Board of Education have jurisdiction over the parties and the subject matter involved in the appeal.

Tony B. is a second grade student in the Winterset Community School District. He was initially enrolled in this district in the 1997-98 school year and attended kindergarten at the Winterset Elementary School. It should be noted that Tony's enrollment in the Winterset School District apparently occurred following a letter sent by Mr. Anker, the school principal, to his parents indicating that it had been brought to his attention that Tony was a child of mandatory school attendance age who had not yet enrolled in the schools. Apparently Tony was enrolled by his parents following the receipt of this letter (Testimony of Mr. Anker). Tony was enrolled in the kindergarten program at age seven. According to records filed by the Appellants, "It became apparent to the kindergarten teacher that Tony could benefit from additional help outside the classroom with regard to speech development and his skills in the areas of language readiness and math readiness." According to notes provided by Ms. Buttolph, his kindergarten teacher (dated June 1, 1998):

. . . over the course of the year, I contacted the mother in order to offer various services we have available at our school . . . The mother . . . declined to have Tony participate, even though I asked several times throughout the year to have him participate.

The records presented to this ALJ also include a letter from Tony's mother (dated June 1, 1998) refusing reading services for Tony for the following school year (1998-1999) and expressing the desire that

Tony be enrolled in the regular first grade for the 1998-1999 school year.

Tony did attend the first grade without any special assistance for the 1998-99 school year. According to testimony presented at the hearing by Ms. Hendricks, his first grade teacher (and notes contained in his file presented at the hearing) there were numerous contacts made with Tony's mother during this school year trying to get permission to provide additional assistance. In September, 1998, at a parent/teacher conference it was suggested that speech services offered through the school and Area Education Agency but were refused by Tony's mother. Tutoring services were discussed and Ms. B. indicated that she would discuss such with here husband. In October, 1998 another discussion apparently occurred between Ms. Hendricks and Ms. B. at which time services were denied. Other records provided in these proceedings (notes from Ms. Hendricks) indicated that further discussions were held in November, 1998 and March, 1999 with similar outcomes.

According to the records submitted, a parent notice form was sent on 3/23/99 to Mr. and Mrs. B. indicating that the district had offered a number of services and/or evaluations had been offered including tutoring, Title I, reading assistance, speech and testing by the AEA and all had been refused by the parents.

An additional letter was sent by Mr. Anker, the elementary school principal, to Mr. and Mrs. B. on May 14, 1999. This letter indicated that school personnel remained concerned about Tony and his lack of progress in school during the 1998-99 school year. A reply to this letter was sent to Mr. Anker, signed by Tammy B., indicated that the family perceived this notice as proposing special education and strongly stated that the family did not agree with special education for Tony.

During the hearing Ms. Hendricks, Tony's first grade teacher, provided further information regarding the basis upon which she felt Tony required additional services beyond that which is provided for all students. Rankings from the Metropolitan reading and math assessments suggested that Tony scored second from the bottom of all first graders at the elementary school. When questioned regarding the services that had been provided for the other students scoring in a similar range to Tony, Ms. Hendricks indicated that these students were receiving special services including special education.

This would seem relevant in confirming that Tony was not being singled out for referral for special services for reasons other than his performance in class. The record also contains a summary of Tony's performance to the other students in his first grade classroom as follows:

Math

Easy addition facts:	Class Av. 89%, Tony 14%
Easy subtraction facts:	Class Av. 86%, Tony 52%
Difficult subtraction	Class Av. 64%, Tony 20%

Reading

2nd Quarter (Overall)	Class Av. 92%, Tony 8%
3rd Quarter	Class Av. 97%, Tony 6%
4th Quarter	Class Av. 88%, Tony 9%

Writing Alphabet

Lower case letters	Class Av. 94%, Tony 38%
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It should be noted that Ms. Hendricks and Ms. Robinson, Tony's second grade teacher described Tony as a very pleasant young man who has made friends in school and who is struggling to learn in the school setting. Ms. Robinson also stated her strong feelings regarding the need for Tony to have additional services to help him gain learning skills.

In the Fall of this year Tony's parents withdrew him from the elementary attendance center and have begun home schooling him. The required format for this process (Competent Private Instruction Report), was filed with the District on 10/15/99.

II. Conclusion of Law

The key issue in these proceedings is whether the LEA and AEA should be allowed to proceed with a comprehensive evaluation of Tony without the consent of this parents. It should be noted that such an evaluation does not mean that a student will automatically

be determined to require special education. As the Iowa Rules of Special Education (1995) note, "The purpose of the full and individual evaluation is to determine the educational interventions that are required to resolve the presenting problem, behaviors of concern, or suspected disability, including whether the educational interventions are special education". The definition of this evaluation goes on to state:

- a. A full and individual evaluation shall include:
 - (1) An objective definition of the presenting problem, behaviors of concern, or suspected disability.
 - (2) Analysis of existing information about the individual, including the results of general education interventions.
 - (3) Identification of the individual's strengths or areas of competence relevant to the presenting problem, behaviors of concern, or suspected disability.
 - (4) Collection of additional information needed to design interventions intended to resolve the presenting problem, behaviors of concern, or suspected disability, including, if appropriate, assessment or evaluation of health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, adaptive behavior and motor abilities. (Iowa Rules, 41.48(3), p. 21).

The primary question before this ALJ is the extent to which the Appellants have demonstrated adequately that Tony is struggling in his school program to such an extent that he is likely to face failure in critical areas unless the school explores other supports needed in his program to help with his needs. As suggested above, a comprehensive evaluation would help determine what these needs are and the means by which such needs can be met, either in general or special education or a combination of both. This ALJ believes that such a criteria has been met and that the risks of continued educational struggles for Tony outweigh any potential negative consequences of proceeding with an evaluation.

It is also important to reiterate the position that proceeding with this evaluation does not, in any way, predetermine that Tony does require special education programs and services. The evaluation team is obligated to explore a number of alternatives for providing needed supports in meeting his educational needs. This wide ranging inquiry is illustrated in a 1994 Hearing from Pennsylvania, (Altoona

Area Sch. Dist., 21 IDELR 506). This case dealt with an eight year old student named Timothy and concluded:

Timothy's parents have expressed concern regarding the possible stigmatization of special education, a concern derived at least in part from Timothy's grandfather's experience with special education several decades ago. There are several safeguards in the present-day system that should allay this concern. First, the mere act that Timothy will be evaluated does not mean that he will be classified as exceptional and placed in special education. The very reason for the evaluation is to determine whether Timothy has an exceptionality, and if so, what type of intervention would be appropriate to address this exceptionality. Second, Timothy's parents will have the opportunity to participate in the evaluation as members of the multidisciplinary team (MDT) . . . If the MDT determines that Timothy is exceptional, his parents will be able to participate in the IEP team that will develop an individualized educational plan for Timothy. . . . Third, a classification as an exceptional student would not necessarily mean that Timothy would be separated from his classmates and placed in another learning environment. Indeed, the law requires that exceptional students be placed in the least restrictive environment (LRE) in which an appropriate program can be delivered. . . . In Timothy's case, the statutory preference for LRE might mean support services or special adaptations provided in connection with the regular classroom environment.

The reason for quoting at length this Pennsylvania decision is the extent to which the ALJ comments in that case are relevant to the situation we are faced with Tony. Apparently there are concerns his family has based on their perceptions of what special education means for an individual child. But in this case, similar to that described in Pennsylvania case, we have a number of procedural protections that protect this family and Tony from automatic placement into special education and that keep the focus of any comprehensive evaluation of Tony on identifying his particular needs, determining the supports necessary in order for him to progress in school and the provisions of any programs or support services in the least restrictive setting.

This was a difficult hearing to conduct with the parents not attending or having representation. This ALJ decided to proceed for several reasons. First, the Appellants presented support verifying that Tony's parents had been properly notified regarding the actions of the school district and the belief that the school has regarding the need for an evaluation (Letter dated 10/6/99). A second element considered by this ALJ is the weighing of the consequences of delaying a decision in this matter versus the extent to which it appears we are dealing with a situation warranting an evaluation. Based on the information available on the day of this Hearing it would seem to this ALJ that the consequences of not proceeding with a careful evaluation are more serious than delaying such an evaluation. The conducting of such an evaluation does not, in any way, mean that Tony will be "placed" into special education. If the evaluation leads to a team recommendation that Tony requires special education, his parents will still have the right to request a hearing challenging this recommendation.

In relation to Tony's home schooling status the following should be noted. While it would be inappropriate to deny the option of home school to Tony and his parents, this change of location and circumstances of instruction does not, in this ALJ's opinion, negate the relevance of the question being posed in these proceedings. The information potentially gained in a comprehensive evaluation of Tony's needs are potentially critical in planning to meet his needs whether this is done at a local attendance center or in his home.

III. Decision

The Appellants prevail in this matter. It is ordered that the Winterset Community School District and Heartland Area Education Agency proceed with conducting a comprehensive evaluation of Tony B. Every effort should be made to actively engage his parents in this process.

In order to assure that Mr. & Mrs. B. have continue to have access to all of the information considered in these proceedings it is also ordered that the Appellants provide for the parents all of the records organized and presented to the ALJ at this Hearing. Although the

parents access to these records was confirmed at this time of the Hearing, it is important to assure that all of the records upon which this decision is based are made available to the parents.

 C. R. Smith
Carl R. Smith, Ph.D.
Administrative Law Judge

 11/20/99
November 20, 1999