

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2001-CA-002537-MR

M.R.D., BY AND THROUGH HIS  
NEXT FRIEND, K.D.; AND  
K.D.

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE JOHN R. ADAMS, JUDGE  
ACTION NO. 00-CI-00349

FAYETTE COUNTY BOARD  
OF EDUCATION

APPELLEE

OPINION  
REVERSING

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BEFORE: BARBER, DYCHE AND TACKETT, JUDGES.

BARBER, JUDGE: Appellant M.R.D., through his parents and next friends, K.D. and K.D., appeal from a ruling finding that the child was offered a free appropriate public education, ("FAPE"), by the Fayette County Board of Education, ("Fayette County"), as required by law. Appellant M.R.D. is a handicapped child in the areas of speech, language, socialization and organization.

As an initial matter, Appellee Fayette County Board of Education asserts that M.R.D.'s brief fails to address the issue raised on the Civil Appeal Pre-Hearing Statement. We find this assertion to be in error, and hold that the brief filed by Appellant sufficiently addresses the issues to be raised on appeal.

In reviewing this matter, the Court is required to conduct a modified de novo review of the entire administrative record. Doe v. Bd. Of Educ. Of Tullahoma City Schools, 9 F3d 455, 458 (6<sup>th</sup> Cir .1993). The Court must independently re-examine the evidence to determine whether the administrative determination and the circuit court decision affirming it were correct. Renner v. Schools of Ann Arbor, 185 F3d. 635, 642 (6<sup>th</sup> Cir. 1999).

Appellants requested an administrative due process hearing in July, 1999, to address deficiencies in the proposed Individual Education Plan, ("IEP"), drawn up by Fayette County to meet M.R.D.'s needs. The Administrative Determination denied Appellants' request for compensatory education or tuition reimbursement, but did order that the Fayette County Board of Education provide M.R.D. with three years of occupational therapy. On administrative appeal to the Exceptional Children Appeals Board, the Administrative Determination was affirmed.

The Fayette Circuit Court in turn affirmed the Board's ruling. This appeal is from that decision.

20 U.S.C. Section 1415(e)(2), the Individuals with Disabilities Act, provides that "any party aggrieved by the findings and decisions made by a state educational agency shall have the right to bring a civil action with respect to the complaint. . . ." The statutory intent of the IDEA is adopted at KRS 157.200, and 707 KAR 1:015, *et seq.*

Under the IDEA, states are provided federal funds to defray the costs of educating children with disabilities. 20 U.S.C. Section 1411. States are required to provide a "free appropriate public education ["FAPE"] . . . for all children with disabilities. . . ." 20 USC Section 1412(a)(1)(A). The definition of a FAPE is an education "which emphasizes special education and related services designed to meet that child's unique needs." 20 USC Section 1400(c). "Special education means specially designed instruction, at no cost to parents or guardians, to meet the needs of a handicapped child. . . ." 20 USC Section 1401(a)(16).

M.R.D. entered the Fayette County school system at age 7. M.R.D.'s teacher at that time recommended that he be offered assistance due to his difficulties. Despite the child's obvious needs, M.R.D. was not evaluated for special education needs, nor was he provided appropriate support services. Appellants assert

that the failure to timely refer the child for special education evaluation was a violation of 707 KAR 1:170 and 707 KAR 1:190.

In fourth grade, at age 11, M.R.D. was evaluated by Fayette County for special education. The IEP developed that year provided for "pull-out" individualized education for 30 minutes each day. In fifth grade, M.R.D. was placed full time in the resource room, for special education. In sixth grade, M.R.D. was placed in a regular classroom. In seventh grade, M.R.D. was returned to the resource room full-time. In eighth grade, M.R.D. alternated between the regular classroom and the resource room. No documentation supported the changes in placement, and no appropriate evaluations of the risks and benefits of the changes in placement were made in the annual IEPs. Additionally, it should be noted that the child's IEP from 1993 required an occupational therapy evaluation, which was never performed. Failure to provide services required by an IEP constitutes a violation of law, and a failure to provide the child with a FAPE. 34 CFR Section 300.346, App. C, No. 45.

Fayette County claims that the identification of M.R.D.'s needs was timely. The record shows, however, that M.R.D. had suffered from difficulties with communicative skills since early childhood, and that these difficulties were apparent to those involved with the child. The child's parents obtained early intervention services for these difficulties, and provided

M.R.D. with speech services and a private school education before he attended public school, from the age of two through seven. This history of treatment was improperly disregarded, and we find that the formal identification of the child's needs by Fayette County was untimely.

An IEP which does not address a child's emotional and behavioral needs fails to provide the child with the required FAPE. Cumberland Valley School Dist. v. Lynn T., 725 A2d 215 (Pa. 1998). The school is required to provide classroom or extracurricular services with a specialist or expert in the area of the child's special needs. Union School Dist. v. Smith, 15 F3d 1519, 1525 (9<sup>th</sup> Cir. 1994). The IEP must provide objective criteria for determining the progress of the student. Failure to include such criteria is not harmless, and constitutes denial of a FAPE. Cleveland Heights-Univ. Heights Sch. Dist. v. Boss, 144 F3d 391, 398-399 (6<sup>th</sup> Cir. 1998).

M.R.D. was placed in the GOW School, a private institution for children with speech and language learning disabilities, for his 1997-98 school year. The GOW School is a residential school whose mission is "to prepare young men with specific language learning difficulties, i.e. dyslexia, language processing, non-verbal learning difficulties, for college and the future." Prior to the start of the 1998-1999 school year, M.R.D.'s parents again requested that the Fayette County school

system provide an appropriate IEP and FAPE for M.R.D. Fayette County failed to develop a minimally appropriate IEP for the child. As a result, Appellants had little choice but to return M.R.D. to the GOW School. Where such a private placement is necessary to meet the needs of the child, the parents have the right to withdraw their children from the public school system and to receive reimbursement from the public school system for the appropriate education. This is particularly so where the public school system has failed to provide the child with an appropriate education. Florence County School District #4 v. Carter, 114 S.Ct. 361 (1993); School Com. of Burlington v. Dept. of Educ. Of Mass., 471 U.S. 359, 369 (1985).

Appellee Fayette County Board of Education responds that the services provided by the public schools were sufficient to meet M.R.D.'s needs. Fayette County claims that decisions made by the school district regarding the education of a disabled child are entitled to a presumption of appropriateness. Alamo Heights Indep. School Dist. v. State Board of Education, 790 F2d 1153 (5<sup>th</sup> Cir. 1986). KRS 13B.090(7) places on the parents of the child the burden of showing that the agency is required to take action. We find that M.R.D.'s parents met this burden by demonstrating the failure of Fayette County to properly diagnose M.R.D.; the failure of Fayette County to provide a special education geared to M.R.D.'s needs; and the

failure of Fayette County to provide assistance for the child in his area of disability.

Each school district is required to make a full and individual evaluation of every child within the school district. 20 U.S.C. Section 1412(a)(3)(c); 707 KAR 1:170. Under 707 KAR 1:180, the school may even secure administrative intervention to assist a child if his parents will not cooperate with servicing the child's needs. Fayette County was aware of M.R.D.'s needs, as evidenced by the testimony of his primary school teachers and his private tutor, who is a special education consultant for Fayette County. Additionally, M.R.D.'s parents did all within their power to meet the very educational needs they urged Fayette County to recognize.

The law requires that schools place children in need of special services in the least restrictive and most appropriate environment. 20 U.S.C. Section 1412(5)(B). Specific factors must be addressed in determining such an environment.

Sacramento School District v. Rachel H., 14 F.R.d. 1398 (9<sup>th</sup> Cir. 1994). The school district must determine whether placement of the child in a regular classroom with supplemental services is adequate. See: Daniel R.R. v. State Board of Education, 874 F2d 1068 (5<sup>th</sup> Cir. 1989). Placement of the child in the Resource Room, or other segregated area, is only appropriate where that is the only environment in which the child can receive the

necessary services. Roncker v. Roncker, 700 F2d 1058, 1063 (6<sup>th</sup> Cir. 1982).

M.R.D. was shuffled back and forth between Resource Room placement and the regular classroom without any evidence of a determination as to which placement was appropriate for him. The testimony by M.R.D.'s teachers at the hearing makes clear that the teachers themselves were not aware of what learning disability M.R.D. suffered from, or which services were appropriate for him. None of M.R.D.'s middle school teachers (6<sup>th</sup> through 8<sup>th</sup> grade) could identify the child's disability or his learning strengths or weaknesses. Although a second IEP was developed for M.R.D. for his seventh and eighth grade year, there is no evidence that this IEP was successfully implemented; that the IEP contained provisions that would actually aid M.R.D.; or that his parents were given copies of the IEP goals, objectives or provisions.

Fayette County asserts that no reimbursement for private services is required where the IEP developed by the public school is "reasonably calculated to provide educational benefits" to the child. Doe v. Bd. Of Educ. Of Tullahoma County Schools, 9 F3d 455 (6<sup>th</sup> Cir. 1993). Fayette County argues that M.R.D. must show that the Fayette County school system was so deficient that it could not have conferred any educational benefit on the child. Fayette County states that all it is

required to provide is "a basic floor of opportunity." Fayette County also claims that M.R.D.'s parents did not give the district's educational system "a chance to succeed" prior to transferring the child to the GOW School. This statement is clearly refuted by the evidence, which shows that M.R.D. was involved in the District's program for over 8 years, without appropriate services being offered.

The original Administrative Determination that M.R.D. was receiving appropriate services from the Fayette County school system was based on the fact that he received passing grades in school. Grades are only one criterion used to determine whether an appropriate education is being provided to the child. See: M.S. ex rel S.S. v. Board of Education of Yonkers, 231 F3d 96 (2<sup>nd</sup> Cir. 2000), holding that passing grades alone are not sufficient to support a finding that an appropriate education was provided.

Lastly, Appellants object to the Administrative Determination's finding that the 1999-2000 IEP developed for M.R.D. was appropriate. The IEP as developed did not address test taking, study skills, note taking or social interaction. M.R.D. provided the testimony of three expert witnesses, a speech therapist, a tutor and a psychologist, detailing the insufficiency of the IEP. An IEP must be calculated to confer educational benefits on the child. See: Muller v. Committee on

Special Education, 145 FRD 95, 102 (2<sup>nd</sup> Cir. 1998). Fayette County failed to provide witnesses rebutting the assertions of the speech therapist, tutor or psychologist.

Fayette County asserts that the Administrative Determination was not clearly erroneous, and must be affirmed on appeal. The circuit court, after review of the file, noted that it was difficult to determine whether M.R.D.'s limited success in school was due primarily to the extensive private tutoring, therapy and assistance provided by the parents, but affirmed the finding of the Hearing Officer that Fayette County's IEP provided a free, appropriate public education to the child. We reverse the circuit court's holding, and determine that M.R.D. was not provided the FAPE required by law. For this reason, his parents are entitled to reimbursement for the private education, speech therapy and other services they have been required to provide him due to the failure of the public school system to honor its statutory obligations.

TACKETT, JUDGE, CONCURS.

DYCHE, JUDGE, DISSENTS.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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