

LEXSEE 2005 US DISTRICT LEXIS 5819

**ANDREW M. and DEIRDRE M., et al. v. DELAWARE CO. OFFICE
OF MENTAL HEALTH AND MENTAL RETARDATION, et al.**

CIVIL ACTION NO. 03-6134

**UNITED STATES DISTRICT COURT FOR THE EASTERN
DISTRICT OF PENNSYLVANIA**

2005 U.S. Dist. LEXIS 5819

April 7, 2005, Decided

JUDGES: [*1] JACOB P. HART, UNITED STATES MAGISTRATE JUDGE.

OPINIONBY: JACOB P. HART

OPINION:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE

I. Introduction

Andrew and Dierdre M. brought this case on their own behalf and on behalf of their twin sons, P.M. and R.M., now four years old, asserting claims under the Individuals with Disabilities Education Act 20 U.S.C. § 1400, *et seq.* ("IDEA"); and Section 504 of the Rehabilitation Code of 1973, 29 U.S.C. § 794. In short, they maintain that the Defendant should have paid for their sons to attend a two-week intensive "camp" in PECS ("Picture Exchange Communication System"), which was the boys' designated primary means of communication.

On February 26, 2004, the parties consented to try this matter before a Magistrate Judge, pursuant to 28 U.S.C. § 636(c), and it was transferred to the undersigned. I heard this matter without a jury on January 10-12, 2005.

I conclude that the IFSP written for P.M. was defective under the IDEA for failing to include PECS camp as a service which would be provided to him, but that the IFSP written for [*2] R.M. was adequate. To render this decision intelligible to the uninitiated, I will begin with a review of the relevant law. Following are my findings of fact and conclusions of law.

II. Legal Standards

Under Subchapter III of the IDEA, 20 U.S.C. § 1432, *et seq.*, the federal government provides grant money to Pennsylvania to assist it in maintaining and implementing a statewide, comprehensive, coordinated, multidisciplinary, interagency system to provide developmental services at no cost for infants and toddlers with disabilities and their families. 20 U.S.C. § 1433. In Delaware County, where the plaintiffs live, the Pennsylvania Early Intervention Program for children from birth to age three is administered by the county Office of Mental Health and Mental Retardation.

Under the IDEA, services are tailored to the unique needs of a pre-school aged child by means of a document known as the individualized family services program ("IFSP"). 20 U.S.C. § 1436. This is a written statement arrived at by a multi-disciplinary team (i.e., physical therapists, speech therapists, and the like, as well as the child's [*3] parents) which outlines goals and objectives for the child, as well as the services that are needed in order to obtain the stated goals and objectives. *Id.*; and see *Bucks County Dep't of Mental Health/Mental Retardation v. De Mora*, 379 F.3d 61, 62 (3d Cir. 2004). It is reviewed on a regular basis, or as the need arises.

An IFSP is required to be "appropriate" in that it should permit "meaningful progress" toward the stated goals. *Id.* at 379 F.3d 64. It is not enough that an IFSP might provide "more than a trivial benefit." See, *T.R. v. Kingwood Township Bd. of Ed.*, 205 F.3d 572, 577 (3d Cir. 2000); *Ridgewood Bd. of Ed. v. N.E.*, 172 F.3d 238, 246 (3d Cir. 1999); *Polk v. Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988). n1

n1 Kingwood, Ridgewood and Polk concern the standard required of Individual Educational Plans developed for school-aged children under a different subsection of the IDEA. Nevertheless, since these cases interpret the term "meaningful", which was applied to IFSPs in *De Mora*, they are relevant here.

[*4]

"To the maximum extent appropriate", services are provided to pre-school aged children in their "natural environments" which include the home and community settings in which children without disabilities participate. 20 U.S.C. § 1432(4)(G). According to a Pennsylvania MH/MR bulletin, this means that services could be provided outside of the natural environment only where a team could justify why they could not be provided satisfactorily within the natural environment. Administrative Record, County Exhibit 2, attached as part of Exhibit 6; Testimony of Pamela McMahon, Trial Transcript at 2-84 to 2-85.

Additionally, the IDEA imposes extensive procedural due process requirements. Complaints by parents must receive a timely administrative resolution. 20 U.S.C. § 1439(a)(1). Any party dissatisfied with the outcome of the state administrative hearing may bring a civil action in state or federal court. *Id.*

The Court of Appeals for the Third Circuit has explained that the burden of proof applied by a trial court hearing an appeal of an IDEA decision is "unusual":

Although the District Court must make its own findings by a preponderance [*5] of the evidence, 20 U.S.C. § 1415(1)(2)(B)(iii) [here, 20 U.S.C. § 1439], the District Court must also afford "due weight" to the ALJ's determination. *Board of Educ. of Hendrick Hudson Central Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 206, 73 L.

Ed. 2d 690 (1982); see also *Holmes v. Millcreek Tp. School Dist.*, 205 F.3d 583, 591 (3d Cir. 2000). Under this standard, "factual findings from the administrative proceedings are to be considered prima facie correct," and if a reviewing court fails to adhere to them, it is obliged to explain why." *S.H. v. State-Operated School Dist. of City of Newark*, 336 F.2d 260, 271 (3d Cir. 2003).

Shore Regional High School Board of Education v. P.S., 381 F.3d 194, 199 (3d Cir. 2004), (explanatory material in brackets supplied).

III. Factual Findings

A. The Twins' Introduction to PECS

The minor plaintiffs in this case, P.M. and R.M., were born on November 10, 2000. Hearing Officer Decision at Finding of Fact 1. Both boys were identified as eligible for Early Intervention services in the first year [*6] of their lives; R.M. for left-side weakness, and P.M. for feeding difficulties. Testimony of Andrew M., Trial Transcript at 1-16.

When the boys were around a year old, their parents became further concerned about their development, particularly about P.M.'s disengagement. *Id.* Andrew M. testified that P.M. "was happy to sit and look blankly at the wall or you couldn't get his attention." *Id.* Upon initial evaluation in the spring of 2002, both boys were found to have significant speech and language delays, and P.M. was eventually diagnosed with Pervasive Developmental Disorder, an autism spectrum disorder. Hearing Officer Decision at page 1; Administrative Record at Exhibit 6. At the time, when the boys were roughly one and a half, they were both pre-verbal, with P.M. not even able to point. *Id.* at Trial Transcript 2-108.

Each boy had behavioral issues arising out of frustration at his inability to communicate. R.M. would cry a lot. Testimony of Andrew M. at Trial Transcript 1-25; Testimony of Dierdre M., Administrative Transcript at 322. P.M. would become physically aggressive when he was frustrated, and would scratch the face and neck of whoever was with him, whether [*7] it was an adult or another child. Testimony of Andrew M., *supra*, at 1-27 and 28; and Testimony of Dierdre M., *supra*, at 321; Deposition of Emmanuelle Monte at 19-20. P.M. was found eligible to receive mental health "wraparound" services from the state, and received assistance from therapeutic support staff aide ("TSS") Emmanuelle Monte for 25 hours a week.

Initially, the boys received speech therapy in their home. Testimony of Dierdre M., Trial Transcript at 2-102 and 103. After about six weeks, their speech pathologist told Dierdre M. that the twins had not made much progress; she suggested they be enrolled in a center-based program operated by the Cerebral Palsy Association, now known as CADES. *Id.* The M.'s agreed. *Id.* Permission for enrollment was quickly obtained from the county. See Trial Exhibit 32 "Justification for Center-based Services."

As Dierdre M. interacted with other parents of children at the CADES center, she began hearing positive stories of children with communication delays who had been trained in PECS. Testimony of Dierdre M. at Trial Transcript 2-109.

PECS is a system of communication marketed by Pyramid Services, Inc., which can be used [*8] as an alternative to verbal speech. It involves the use of a book filled with removable icons (pictures) printed on separate cards. Testimony of Andrew M., Trial Transcript of 1-18 to 1-19. In a

series of steps, a child is taught first to request an item by presenting the appropriate icon, and, later, to make more sophisticated statements. Id.; Testimony of Scott Helsinger, Trial Transcript at 1-96 to 1-102.

More specifically, PECS is taught in six phases, of which four were described at trial. Testimony of Scott Helsinger, Trial Transcript at 1-96 to 1-100. At the first phase, a student is taught to deliver a single picture to a listener in order to request a specific item. Id. at 1-96 to 1-97. One adult is needed to act as the listener, and a second adult is needed to prompt the student to select and deliver the picture. Id. When this is mastered, it is attempted at Phase Two to teach the student to travel independently to get a picture and to approach a listener who is not directly in front of the student. Id. At first, the prompter assists the student with this. Id.

Phase Two is described as an ongoing phase, because once skills taught in later phases are [*9] mastered, the student will then need to be taught to travel independently to instigate those more advanced skills. Id. at 1-100. Clearly, it is the recognition of PECS as a mode of communication, as acquired in Phase Two, which makes PECS a true communication system.

In the first part of Phase Three, the student learns to choose the correct picture rather than a "distractor picture" of a non-desired item. Id. at 1-98. In the second part of Phase Three, the student chooses between two pictures of desired items. At Phase Four, the student is taught to construct sentences with PECS icons, using not only pictures of items, but symbols for "sentence starters" such as "I want." Id. at 1-99.

Dierdre M. heard of children who had attended the two-week PECS summer camp to instill a proficiency in PECS, and had then received the services of a PECS consultant in the home. Testimony of Dierdre M. at Trial Transcript 2-109. These children had been successful, and had even begun to talk after training in PECS. Testimony of Dierdre M., Administrative Transcript at 367.

Accordingly, in September of 2000, at R.M.'s IFSP review, Dierdre M. asked the boys' service coordinator, Michael Breedlove, [*10] if her children could attend the camp and obtain a PECS consultant. Testimony of Dierdre M. at Trial Transcript 2-109; Testimony of Dierdre M., Administrative Transcript at 340. Breedlove said that he was not familiar with PECS, but that he would ask his supervisor, Maureen Kearney. Id. at 340-341.

Dierdre M. contacted Mindy Glassberg at Pyramid Services, who told her that the camp had been held over the summer, and the M. family had missed it. Testimony of Mindy Glassberg Staffin, Trial Transcript at 1-119 to 1-120. However, the County agreed to fund PECS consulting services. Testimony of Dierdre M., Trial Transcript at 2-112.

In October, 2002, Andrew and Dierdre M. attended a two-day PECS training recommended by Glassberg. Testimony of Andrew M., Trial Transcript at 1-30 to 1-32.; Testimony of Dierdre M. at 2-104 and 2-112. They brought with them an au pair they had recently hired specifically to assist them in teaching the children PECS, since this required two adults per child, and Andrew worked full days. Testimony of Dierdre M., Trial Transcript at 2-104.

Later the same month, Mindy Glassberg began working in the M. home as a PECS consultant. Testimony of Andrew M., Trial [*11] Transcript at 1-19; Testimony of Mindy Glassberg Staffin, Trial Transcript at 1-119. Theoretically, Glassberg's role was not to deliver direct services to P.M. and R.M., but to train Dierdre M., the au pair, Emmanuelle Monte, and the therapists who interacted with the children, although she worked with the boys directly when she modeled training for the adults. Id. at 1-127.

When Glassberg came to the M. house, she would bring a number of desirable toys which she used to motivate the boys to make PECS requests. Testimony of Dierdre M., Trial Transcript at 2-104 to 2-105; Testimony of Mindy Glassberg Staffin, (Mindy Glassberg had married and changed her name) Trial Transcript at 1-155. Apparently, in the controlled and supported environment of Glassberg's sessions, the boys had success in using their PECS books. Administrative Record at County Exhibit 10, attached as part of Exhibit 6. Glassberg's treatment notes reflect almost exclusively what happened during her sessions, and show that the boys were achieving goals in phases three and four. Administrative Record at County Exhibit 10, *supra*.

According to Dierdre M., however, when Mindy Glassberg and her bag of toys were [*12] not present, the twins had no interest in using PECS. Testimony of Dierdre M., Trial Transcript 2-100 to 2-101; 2-104 to 2-105; 2-107 to 2-108; 2-123; 2-128.

Dierdre M. testified:

It was very difficult when we were on our own. Mindy always brought a big bag of toys that were every child's dream. ... So what Mindy said to us was - like as she [testified] you have to pro-reinforcers [*sic*? "provide reinforcers"?]. And unfortunately, the twins, no matter how great it was, if they thought they were gonna have to work for it, they just threw the reinforcer to the side. That didn't really work for us. So what Mindy suggested then was that we would have to start using food. And she said that we will feed them in the morning for breakfast ... and Mindy said to us that we would have to get up to - now, I don't mean to say that she ever said to us to starve the children or anything like that. What she did tell us was at the start we had to get up to 30 to 40 trials a day. ... So we, you know, we were kind of saying to her ... you know, "Mindy, this seems very cruel and they're - they don't want to do it." And she said to me, "You" - you know, she said, "If you give into them, [*13] " she said, "As hard as it is, if you give into them then they're going to know that if they scream and roar they'll get what they want."

Trial Testimony at 2-106. She described breakfast time as "always a nightmare." The au pair left at this time, saying: "I just can't. It's just too hard." *Id.* at 2-107. The M.s hired a new au pair.

Dierdre M. testified that she told Glassberg repeatedly that things were not going well, asking her "Look, is it really always this hard because it seems unfair that we have to use, you know, food to kind of - to get them to use it." *Id.* at 2-107. According to Dierdre M., Glassberg kept reassuring her that "if you don't give in to them, then they'll know that this is what they have to use as their mode of communication." *Id.*

Despite Glassberg's positive notes, Dierdre M. testified, the boys were not accepting PECS as a form of communication, and were becoming deeply frustrated every day:

DIERDRE M.: It looks great on notes when you say, "Wow, Phase 1 to Phase 4." That didn't mean anything. If a child is not going to go to a book, if he's not gonna recognize it as his mode of communication when he's hungry, and what he turns [*14] to instead is either ... like he tore a mole off our au pair's neck in frustration. ... But I mean, he was so frustrated because his needs could not be met.

COUNSEL: And when you say, he, would you - would you -

DIERDRE M.: P. was the one that was more physically forceful. He was very - he always physically went for me, Andy [and his brothers]. But what R. would do was that he would just scream and scream and scream and scream. And that was it.

Trial Transcript at 2-129.

At the administrative hearing, Dierdre M. similarly testified:

I want to clarify that they will use it if the item is set right in front of them. They will not spontaneously go to the book ... He [PM] is so frustrated that he's not getting what he wants. ... The more we put the PECS book in front of him, the more he just, you know, just gets madder and then he just - you know, something explodes in him and he physically goes for you, and then we see him that he zones out after. Obviously, he puts a lot into this because, you know, I have scars around my neck. ... R. is better because R. can kind of - he will always attempt to use his words and sometimes he can be a little more cooperative [*15] to use the book ... So, like, if you can't understand what he's saying, then what he does is he cries and cries and cries until you repeat or until you sort out what it is that he wants.

Administrative Transcript at 333-335.

Emmanuelle Monte, whose testimony was admitted in the form of a deposition, since she had married and moved to Bahrain before trial, confirmed, specifically as to P.M., that, although he was able to learn PECS from Glassberg, he never spontaneously used his PECS book, and became very frustrated when he was constantly redirected to the book. Emmanuelle Monte Deposition at 22.

As Dierdre M. understood it, the children had not met their phase two goal of accepting PECS as a mode of communication. She said: "Like a lot of people say that Phase 2 is re-introduced and it's ongoing. But I mean, if you look at what Phase 2 is, I mean, I know that's true, but they have to get the basic part of Phase 2. So the basic part of Phase 2 is to independently go to their books." Trial Transcript at 2-127.

I asked Dierdre M.: "In other words, you're moving from them understanding that there's a connection between a picture of an object and then getting it, and then moving [*16] to the idea that that's their way of communication so that they can mentally decide in the absence of the picture, 'I want a yogurt. I have to get that picture out.'" Id. "Absolutely" she responded. Id.

This, too, had been fully discussed at the administrative hearing:

DIERDRE M.: Phase two is something, you know, that needs to be revisited constantly that they just don't have. ...

COUNSEL: And phase two is the independent approach to using the system?

DIERDRE M. Yes. And no child is going to learn language unless they learn it spontaneously and independently.

Administrative transcript at 358-59.

B. The M.s' Efforts to Obtain Funding for the PECS Camp

As mentioned above, Dierdre M. had originally requested PECS camp in September, 2002, but because she had missed it for the year, it appears that the issue was dropped at that time and the family went forward with home-based PECS counseling. However, Dierdre M. contacted Maureen Kearney - Michael Breedlove's supervisor - in late December or early January of 2003, asking whether the twins could attend the PECS camp in the coming summer. Testimony of Dierdre M., Trial Transcript at 2-112. She [*17] called Kearney directly because Michael Breedlove had deferred all decisions on the issue to her, citing his lack of knowledge regarding PECS. Testimony of Michael Breedlove, Trial Transcript at 2-219, 2-232. According to Dierdre M., Kearney told her she would have to speak to Glassberg before making a decision. Testimony of Dierdre M., Trial Transcript at 2-112.

On March 27, 2003, Dierdre M., Maureen Kearney, and Glassberg met in the M.'s home. Testimony of Maureen Kearney, Trial Transcript at 3-187. Maria Streletz, the speech therapist who worked with both boys, was not present, but she had written a detailed "To Whom It May Concern" letter for each boy, explaining why PECS was necessary for him, and recommending that the boys attend the PECS camp because it was "the most effective way" for them to meet their goals, and bring them "closer to ending their need for an augmentive system [of communication]." Plaintiffs' Exhibits 15 and 42.

Kearney refused to include the PECS camp in the twins' IFSP. Testimony of Maureen Kearney, Trial Transcript at 3-189. Her decision was largely based on the input of Mindy Glassberg, who was non-committal when asked if the boys could reach their [*18] PECS goals without the camp. Id. When asked whether the camp was "necessary", Glassberg said that it was not. Id. Dierdre M. was surprised at Glassberg's response, because, as she said, Glassberg "had encouraged us all the time to go to PECS camp, and she said it would be great for the boys and she really encouraged us." Testimony of Dierdre M., Trial Transcript at 2-165 to 166.

Significantly, Glassberg had told Dierdre M. that she could not tell the County that the camp was "an absolute must" because she had a conflict of interest in that she, herself, was the provider of the camp. Id. at 2-175. Glassberg testified to the same thing at trial:

GLASSBERG: I didn't have any concerns that they ought to send - I think it's a conflict of interest. I run the camp. I'm a consultant in the home.

ATTORNEY: And that's why, I think you had testified at your deposition you don't typically recommend the camp, because you feel it's a conflict of interest, correct?

GLASSBERG: Correct.

Testimony of Mindy Glassberg Staffin, Trial Transcript at 1-210.

At the administrative hearing, Dierdre M. testified that Kearney and Blanton had told her several times that Glassberg [*19] could not recommend her own services, "that it would be a conflict of interest." Administrative Transcript, at 349.

Moreover, Glassberg told Dierdre M. that she had been trying to set up a PECS pre-school in Delaware County, and "she had to be very careful with Early Intervention [i.e., the County] because she was trying to get Early Intervention as her clients to send children there." Testimony of Dierdre

M., Trial Transcript at 2-174.

Kearney testified that she told Dierdre M. at this meeting that she would not approve funding for the PECS. Testimony of Maureen Kearney, Trial Transcript at 3-189. However, despite having signed a form requesting an administrative meeting, Dierdre M., was left with the impression that Kearney would look into the matter and get back to her with an answer. Testimony of Dierdre M., Trial Transcript at 2-116. She was surprised, therefore, when Melinda Blanton called her to arrange an administrative review meeting with Dorothy Klein, the Delaware Count MR/MH Administrator. Id. She said she did not realize there was any member of the children's IFSP teams that failed to recommend the PECS camp, and asked Blanton to look into the matter before scheduling [*20] a meeting. Id.

Blanton reviewed the boys' IFSPs, and spoke to their CADES classroom teacher, Vicky Lewis, and possibly to Glassberg. Testimony of Melinda Blanton, Trial Transcript at 3-69 and 3-107 through 113. She told Dierdre M. that the IFSPs appeared adequate as written, without PECS camp. Blanton also based her decision on the fact that the PECS camp would take the children out of their "natural environment." Id. Consequently, a meeting was scheduled with Dorothy Klein.

Following the April 29, 2003, meeting, Klein reviewed the twins' IFSPs and progress notes. Testimony of Dorothy Klein, Trial Transcript at 3-21. The next day, she issued a letter deciding that the County would not fund the PECS camp. Plaintiff's Exhibit 61a. She wrote:

From the reports provided and your input at our meeting, both boys are making progress using PECS in the home with assistance provided from the PECS consultant 12 hours a month. While we agree that your children may benefit from the 2 weeks PECS camp, it has not been established that the camp is necessary for your children to continue to make progress on the goals as outlined in the IFSP.

Id. Accordingly, the M.s requested [*21] an administrative hearing.

C. The Administrative Hearing

By the time the administrative hearing was held, on June 23 and July 10, 2003, the boys were approximately two and a half years old. The Hearing Officer heard testimony from Andrew and Dierdre M., Vicky Lewis, Pamela McMahon, Michael Breedlove, Maureen Kearney, Melinda Blanton, Maria Streletz, and Steven A. Kossor, a psychologist from P.M.'s wraparound service provider.

Andrew M. explained:

P. is not communicating. He's come to a standstill with the PECS. He will not do it independently. Neither P. nor R. So, we have to do something. We, as his parents, it is our ultimate responsibility.

Administrative transcript at 208. He testified that R.M. had the same need to communicate as P.M., but was not in "as bad a position." When asked whether he believed P.M. would learn to communicate without PECS camp, Andrew M. replied that he was "very concerned that he wouldn't", explaining that it seemed to him that P.M. was beginning to accept that he could not communicate and "just zone out." Id. and 209.

Maria Streletz, the speech therapist, agreed with Dierdre M. that the boys did not have a basic knowledge [*22] of phase 2 of PECS, and described P's PECS skills as "stagnating." Administrative Transcript at 302. Streletz testified that she believed the intensive camp was necessary. Id. at 296-297. She said that P.M. had no verbal language, and would, at times, abandon a request for an item rather than use his PECS book:

So, I feel like we have kind of exhausted the realm of possibility at home for the moment. We have done everything in our power to get them to use it in the home, in the school, but he still avoids the situation. So, I'm not sure, but I tend to think that - especially since he's responded very well to PECS, that more intensive PECS services where he - there is no other way of getting around - using PECS would be warranted to ensure that he's going to use this spontaneously.

Administrative Transcript at 298.

Vicky Lewis, the classroom teacher at CADES, testified regarding P.M.:

He does not self-initiate PECS. There needs to be a prompt in front of him, whether it be a bottle of glue at art time with a picture of glue on his PECS book in order to prompt him to get the correct picture. ... It's very difficult to get him to use PECS and to use the PECS [*23] system during independent play time ... he often avoids the situation and leaves.

Administrative Transcript at 390.

Mr. Kossor, who supervised Emmanuelle Monte, and had worked with many children with P.M.'s diagnosis of PDD-NOS, testified that P.M. had improved his behavior, but was still "severely impaired in his ability to communicate and, therefore, has temper tantrums and displays of maladaptive behavior related to frustration." Administrative Transcript at 275. Based on his collection of behavioral data relative to P.M.'s progress up to that date, Mr. Kossor opined that it was unrealistic to expect P.M. to attain higher PECS skills without an intensive immersion-type experience, such as that provided by PECS camp. Id. at 280-282.

On the contrary, Pamela McMahon, the County Supports Coordination manager, or case manager, testified that the PECS camp could not be provided by the County because it did not meet the "natural environment" criterion. Administrative Transcript at 56-59. She testified that a departure from the natural environment of the home would be justifiable only in extreme circumstances, such as where "someone's house burned down." Id. at 58.

McMahon [*24] did not address the fact that the children were spending several hours every week at CADES, which was not a natural environment as defined by the MH/MR bulletin. Michael Breedlove, the M.s' service coordinator, testified that CADES was justified without a problem, even though it involved regular services delivered at an out-of-home site used only by children with special needs. Administrative Transcript at 121-123.

Susan Peterson, Pyramid Educational Consultant's Director of Operations, submitted a letter in which she explained the nature and purpose of the intensive PECS camp, and spoke of the twins' accomplishments and difficulties in using PECS. She wrote:

Both M. boys are certainly appropriate candidates for PECS camp. A variety of different situations would be contrived to increase the likelihood of initiation, and they would have practice communicating with a number of different people, within many situations. PECS camp would likely be highly beneficial to their progress. We cannot, however, state that it is essential to either boy's continued progress in communication. Nor could specific progress be guaranteed. As with any educational service, it is impossible to "guarantee" [*25] certain results.

Peterson Letter, Administrative Record at Exhibit 6.

On July 15, 2005, the Hearing Officer issued a decision denying funding for PECS camp. Administrative Record at Exhibit 2. Among his enumerated findings of fact were the following:

8. A review of multiple Individualized Family Service Plans and goals for both boys revealed progress.
9. Correspondence from Pyramid Educational Consultants (June 11, 2003) indicated that the PECS Summer Camp would be "beneficial to their progress" but "cannot, however, state that it is essential to either boy's continued progress in communication."

Administrative Record at Exhibit 2. He wrote: "I note a preponderance of witness testimony indicating that the boys have made progress under the current IFSP."

The Hearing Officer concluded:

A fundamental purpose of an Early Intervention (EI) service is to allow the child to participate and progress in his natural environment. The issue is not whether the children will benefit from the PECS summer camp but the appropriateness of the IFSP - Individualized Family Service Plan. It is clear from the evidence and testimony presented that their needs are different. [*26] P. requires more intensive support in the behavioral and speech/language domains. However, the children have experienced growth and progress with the existing IFSPs. Indeed, there was testimony indicating satisfaction with the IFSP from both parties. Absent strong evidence and testimony to refute the above noted facts, I find that it is reasonable to accept the Delaware County Office of MH/MR determination that P.M. and R.M. are receiving appropriate intervention services through the IFSPs. The presence and implementation of an appropriate IFSP renders the question of the PECS summer camp moot. There was neither compelling evidence nor testimony to contradict or impugn the data and recommendation proffered by the Delaware County Office of MH/MR. The record indicates that the children are making progress in all domains of the IFSP, inclusive of speech/language. It is for these reasons that I find for the Delaware County Office of MH/MR.

Id.

PECS camp was held during the period after the hearing, but before the Hearing Officer issued his decision. P.M. attended the camp. Testimony of Dierdre M., Trial Transcript at 2-142 to 2-145. His parents paid the \$ 3,000 tuition out [*27] of their own pockets because they could not afford the tuition for both boys, and felt P.M.'s communication needs were more severe than R.M.'s. Id.

They had enrolled R.M. as well, on the expectation that they would receive funding from the County, but had been asked to withdraw him after the first day since they could not forward the money for his tuition. Id.

According to Dierdre M., PECS camp was wonderful for P.M. When asked if there was a difference in his progress between before and after the camp, she said: "There was an amazing difference. You couldn't even compare the difference." Id. at 2-137 to 2-138. Within two or three days of beginning the PECS camp, P.M. began to use his PECS book independently. Id.

Dierdre M. testified:

For the first time we were able to communicate with our child. Our child was able to tell us, "I want" - no, he wasn't speaking at the time, but he was able to tell us what he wanted. And every - we were so excited and the therapists were so excited

Trial Transcript at 2-174.

Emmanuelle Monte confirmed this:

Q. Can you tell us the difference between PM's communication skills before and after the two-week [*28] period?

A. It was an amazing difference because PM was going to his book spontaneously without any of us prompting him to go to his book. A lot of verbal language came out as well. So it was a tremendous difference, and I saw a lot of difference in his behaviors. He wasn't getting as frustrated. He was able to communicate his wants and needs.

Emmanuelle Monte Deposition at 28.

Also at PECS camp, Dierdre M. met Scott Helsinger, a PECS consultant, who confirmed what she had suspected: that the boys had been pushed too far ahead before they accepted PECS as their form of communication. Id. at 2-138. He advised her to "completely drop and stop everything and go back completely to Phase 2." Id. Dr. Bond, the man who developed PECS gave Dierdre M. the same advice when she met him at the camp. Id. at 2-173. Between the PECS practice at camp, and this new approach, Dierdre M. testified, P.M. "got it very quickly." Id.

At the M.s' request, Helsinger replaced Glassberg as their home PECS consultant. Id. at 2-138 to 2-139. When Helsinger started work at the M. home, in August, 2003, he began working with P.M. at Phase 3 of PECS. Testimony of Scott Helsinger, [*29] Trial Transcript at 1-106. R.M., however, was communicating so well with verbal speech that Helsinger recommended that his PECS services be discontinued. Id. at 1-91. The M.s agreed to this.

D. Additional Trial Testimony

At trial, I heard testimony from Andrew and Dierdre M., Mindy Glassberg (now Mindy Glassberg-Staffin), Scott Helsinger, Pamela McMahan, Michael Breedlove, Steven Kossor, Dorothy Klein, Melinda Blanton and Emmanuelle Monte (by deposition). Their testimony is essentially summarized above.

I also heard from two experts who had not testified at the administrative hearing. Ellen

Schwartz, a speech pathologist, opined that, prior to the camp, P.M. was taught PECS in a way that was not assisting him in his activities of daily living:

From what I read, the PECS was used at the table to train him to request gimmicky toys and items that held interest for him. But there was no transfer to his normal routines.

Id. at 2-43.

She concluded that PECS camp had been a necessity for P.M.:

Because for the previous 7 months, despite the training he was receiving, he was making very, very minimal progress and there was [*sic*. "were"] parent [*30] frustrations, behavioral outbursts, and the family was not able to communicate with him, he was not communicating with the family. He wasn't growing. He wasn't learning. And it became apparent that he required the structure and intensity of a more dense program, such as what they offered at the camp so he could be saturated with the exchange system.

On the contrary, after the PECS camp:

He (P.M.) was a communicator. He had learned the routine of using pictures - picture exchange to communicate requests and to discriminate between objects, and was starting to use sentence strips, and actually had started to vocalize and to verbalize along with his use of the pictures. By report, there was a significant change in his use of communication and his behavior.

Testimony of Ellen Schwartz, Trial Transcript 2-36.

Schwartz was asked: "In your opinion, could P. have made this progress without the intensity of the PECS camp?" Id. at 2-41. She responded: "There was no other 2-week period in the 7 prior months that he made any kind of significant gains comparable to the 2-week period of the camp. So I have to account for that intense program that's making the change." [*31] Id. at 2-42. When asked again whether P.M. could have gained as much in any other two week period without the camp, she said: "No." Id.

Dr. Kenneth Thurman held a doctorate in special education, and had worked extensively for thirty years in the designing and implementing early intervention programs for pre-school aged children. Testimony of Dr. Thurman, Trial Transcript at 3-144 to 3-149. Dr. Thurman testified that he found the decision-making process faulty in this case:

Q. That is - did you see a clear path from the IFSP team to the decision that the children should or should not have the services?

A. No, I didn't. And what I see in my review of the record is the parents putting on the table the notion of PECS camp. There seemed to be some discussion about that. Several of the people involved in the discussion, the Service Coordinator in particular, seemed unaware of what PECS even was and began to kind of go up the hierarchical ladder to various other people. And what I got, again from reading the various depositions and interrogatories, et cetera, is that ... the decision seemed to be

kind of kicked back and forth, and when - in fact, it's a team decision [*32] that if people had come to the team prepared and informed, could have - people could have sat down and made and talked through and been done with.

Id. at 3-170.

Dr. Thurman also testified that he did not believe that the "natural environment" criteria would have precluded the PECS camp from inclusion in an IFSP: "the family really is the one that determines what is best for the child in terms of environments." Id. at 3-166.

IV. Conclusions of Law

I find that the Plaintiffs have shown by a preponderance of the evidence that P.M.'s IFSP plan was defective for failure to include the PECS camp. The decision to the contrary was not made by consensus of the team, as it should have been, but was, rather, imposed upon the parents and therapists by non-treating individuals, initially Maureen Kearney and then her superior, Dorothy Klein. This is evident from the fact that the boys' parents, speech therapist, and classroom teacher all maintained that the camp was necessary. Their occupational therapist was, by all accounts, neutral, and Michael Breedlove, the boys' services coordinator, expressed no opinion at all and deferred to Kearney.

The only treating individual [*33] who did not positively recommend the camp was Mindy Glassberg, the PECS coordinator from Pyramid Services. Mindy, however, stated at trial that she would never recommend the PECS camp as a necessity because she ran the camp and therefore had a conflict of interest. Dierdre M. further testified that Glassberg had confided to her the source of a second, related conflict; Glassberg hoped to start a PECS pre-school which Early Intervention students could be prescribed in their IFSPs. Therefore, she had to protect her relationship with the County.

Thus, Kearney, McMahan and Blanton mishandled Glassberg's opinion in two respects: (a) they should have discounted it altogether since it was clear that Glassberg had a conflict of interest; and (b) having asked for an opinion, they should have realized that Glassberg's failure to urge the boys' enrollment in the camp was more a function of her attempt to take a neutral position than a reflection of her opinion of the camp's usefulness.

The decisionmakers also relied upon Glassberg's treatment notes, which showed considerable progress in the boys' use of PECS. Nevertheless, the decisionmakers also had available to them information from both [*34] Dierdre and Andrew M., the children's speech therapist, their classroom teacher, and P.M.'s TSS, that the skills Glassberg was developing in controlled circumstances were not carrying over into the boys' everyday lives. All parties concerned agreed that this was particularly problematic for P.M., because he was not acquiring spoken language, and because he became violently upset when frustrated. If the decisionmakers had not given Glassberg's opinions and notes undue weight (when, as discussed above, her opinion should have been discounted) and if they had properly credited the opinions of the parents and other treating professionals, it would have been clear that this was, at the least, a matter for further inquiry.

Unfortunately, the mistakes made by Kearney, Blanton and Klein were repeated at the hearing level. The Hearing Officer's failure to properly credit the opinions of the parents and treating professions is apparent where he wrote in his decision that "a preponderance of witness testimony indicated that the boys have made progress under the current IFSP." He cited to six pages of the

hearing transcript in support of this statement, but four of the quotes were from non-treating [*35] individuals who could only have been relying on Glassberg's reports, namely McMahon, Breedlove, Kearney and Blanton. See Administrative Transcript at 39, 80, 143, 227, 284, 381. Indeed, Breedlove and Kearney explicitly *refer to* Glassberg as the source for their opinions on the very pages the Hearing Officer Cited. Id. at 80 and 143.

The fifth cite was to the testimony of Steven Kossor, who actually said: "[P] has demonstrated progress. So, there is a reasonable probability that he can attain that goal. But the rate of progress is not sufficient in my opinion to give him enough velocity to get there." Id. at 284. Thus, the Hearing Officer took his statement out of context. The last cite was to the testimony of Dierdre M., whose overall testimony clearly expressed her opinion that the boys' progress in PECS was limited to their sessions with Glassberg. Id. at 381.

The Hearing Officer gave undue weight to Susan Peterson's statement in her letter that "we cannot ... state that [PECS camp] is essential to either boy's continued progress." The letter, read as a whole, obviously recommends the camp. The failure to call the camp "essential" or to "guarantee" specific [*36] progress, is in the nature of a caveat. It is understandable that a service provider would avoid making such extreme claims as that its service is "essential", to avoid giving the impression that it is a purveyor of snake-oil. Moreover, as Plaintiffs have pointed out, no law requires a service to meet the high standard of "essential" in order to be prescribed.

Clearly, the Hearing Officer, like the County Administrators, improperly favored the testimony of Pyramid employees over that of the children's parents, teacher, speech therapist, and even P.M.'s behavioral expert.

Having noted this flaw in the decisionmaking process, and having re-evaluated the testimony available to the administrative decisionmakers, as well as the new testimony presented to me at trial, I find that the preponderance of the evidence greatly favors the conclusion that P.M.'s IFSP was inadequate without the inclusion of the PECS camp. As Dr. Schwartz opined, P.M. was learning to use PECS to request gimmicky toys in a contrived environment. However, the intensive experience offered by the camp was necessary to permit P.M. to make meaningful progress toward his IFSP goals.

In reaching this decision, I have considered [*37] the evidence that P made unprecedented progress at the PECS camp. I look upon this evidence with caution, since the issue before me is not what hindsight shows, but whether P.M.'s IFSP was appropriate as of July, 2003. However, it is pointless to ignore what is now known - that Dierdre M. was correct in believing that the camp was the missing ingredient which would turn PECS into something more than a party trick for P.M., into a real means of communication.

At the same time, however, it is impossible to ignore the post-July, 2003, evidence suggesting that the camp was not necessary to permit R.M. to meet his communication goals. Throughout the process, it was clear that everyone involved believed that the camp was more important for P.M. than for R.M., because R.M.'s communication skills were developing. Since, in September of 2003, his parents agreed that R.M. had so much verbal speech that PECS was no longer necessary for him, his IFSP was plainly adequate without PECS camp.

It is not clear whether the "natural environment" argument put forth by the County at the administrative hearing is relevant to my decision. The Hearing Officer did not rely upon it in his decision, and, although [*38] it was discussed at trial, it does not appear to have been raised again as an argument by the County. In any event, I do not find the argument persuasive. Dr. Thurman

explained that the preference for the natural environment was encoded in the IDEA to be used as a shield for the child, to prevent unwanted out-of-home placements, and not as a sword, to keep a child from services to which he or she would otherwise be entitled.

It is also striking that the children were placed at the CADES pre-school with little ado, even though it provided services outside a natural environment on a regular, ongoing basis. PECS camp, by contrast, although it was intensive, was self-limiting to a two-week period, and was specifically designed to permit a child to succeed in his or her natural environment. This suggests that the County's reliance on a "natural environment" argument had an element of pretext, or, perhaps, was simply not well thought out.

For the above reasons, I find in favor of the Plaintiffs on their IDEA claim with respect to P.M., although not with respect to R.M. As to damages, I find that Plaintiffs are entitled to compensation for P.M.'s tuition. Under *Florence County School District Four v. Carter*, 510 U.S. 7, 126 L. Ed. 2d 284 (1993), [*39] parents have a right to reimbursement for a unilateral placement in a private school if a federal court concludes both that the County's approved placement violate the IDEA and that the private school placement was proper under the IDEA. See *T.R. v. Kingwood Tp. Bd. of Education*, 205 F.3d 572, 580 (3d CiR.M. 2000).

Clearly, the facts here are different than the usual Florence County scenario, but the case provides sufficient guidance for my determination. I have found that P.M.'s IFSP violated the IDEA in that it did not permit him meaningful progress toward his stated goals, and that, therefore, the County's suggested placement was inadequate. I have also found that PECS camp was required for P.M. under the same standard. Therefore, reimbursement is warranted.

V. The Rehabilitation Act

The Third Circuit Court of Appeals has said in several cases that there are few differences, if any, between the IDEA's affirmative duty to educate a handicapped child and the Rehabilitation Act's prohibition in § 504 of discrimination against a handicapped individual. *Ridgewood Bd. of Education v. N.E.*, 172 F.3d 238, 253 (3d CiR.M. 1999); *W.B. v. Matula*, 67 F.3d 484, 492 (3d CiR.M. 1995). [*40] Indeed, in *Matula*, the Court of Appeals cited legislative history which suggested that Congress "specifically intended" that violation of the EHA (the predecessor to the IDEA) "could be redressed by § 504." 67 F.3d at 494.

The County has not refuted this, but argues only that a § 504 violation was not present since the boys' IFSPs reasonably accommodated their special needs. Because I have found that P.M.'s IFSP did not reasonably accommodate him, Plaintiffs are entitled to recover on their § 504 claim as it relates to him. As the prevailing parties in a Rehabilitation Act case, Plaintiffs are entitled to recover attorney's fees. 29 U.S.C. § 794a.

VI. Conclusion

For the reasons set forth above, I now enter the following:

ORDER

AND NOW, this 7th day of April, 2005, following a bench trial held before me on January 10 through 12, 2005, upon consideration of the parties' subsequently filed proposed findings of fact and conclusions of law, and for the reasons set forth in the attached decision, I now ENTER JUDGMENT in favor of PLAINTIFFS on their IDEA and Rehabilitation Act claims pertaining to P.M., and award damages in the [*41] amount of \$ 3,000 plus attorney's fees.

Counsel for Plaintiff may submit a petition for attorney's fees by four weeks of the date of this Order and Opinion.

BY THE COURT:

JACOB P. HART

UNITED STATES MAGISTRATE JUDGE