

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

C.H., individually and on behalf of F.H., a child
with a disability,

Plaintiffs,

COMPLAINT

-against-

Case No.

GOSHEN CENTRAL SCHOOL DISTRICT,

Defendant.

11 CIV

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C.H., individually and on behalf of F.H., a child with a disability, by and through her attorneys,
LAW OFFICE OF ANDREW K. CUDDY, for her complaint hereby alleges:

1. This is an action brought pursuant to civil action provisions of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415(i)(2).
2. Plaintiff C.H. resides in the County of Orange, State of New York.
3. Plaintiff F.H. is a child with a disability as defined by IDEA, 20 U.S.C. § 1401(3)(A).
4. C.H. is the parent of F.H. as defined by IDEA, 20 U.S.C. § 1401(23).
5. Defendant GOSHEN CENTRAL SCHOOL DISTRICT is a local educational agency as defined by IDEA, 20 U.S.C. § 1401(19), and, as such, is obligated to provide educational and related programs and services to its students in compliance with the applicable federal and state statutes, regulations, and the U.S. Constitution, and is subject to the requirements of 20 U.S.C. § 1400 *et seq.*, and the regulations promulgated thereunder.

JURISDICTION AND VENUE

6. Jurisdiction is predicated upon 28 U.S.C. § 1331, which provides the district courts with original jurisdiction over all civil actions arising under the laws of the United States, and upon the civil action provision of IDEA, 20 U.S.C. § 1415(i)(2)(A), which provides that the district courts of

the United States shall have jurisdiction of actions brought under section 1415(i)(2) without regard to the amount in controversy.

7. Venue is predicated upon 28 U.S.C. § 1391(b)(1) based upon the residence of the plaintiff and defendant, and upon 28 U.S.C. § 1391(b)(2) based upon the location of the subject matter of this action.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

8. By letter dated June 18, 2010, the parents requested an impartial due process hearing, alleging a denial of a free appropriate public education (FAPE) for the 2009/10 and 2010/11 school years.

9. The district appointed Robert Briglio, Esq., as impartial hearing officer (IHO).

10. IHO Briglio conducted hearing dates on September 20 and 21, November 29 and 30, and December 1, 2010, and on February 16, 2011.

11. The IHO heard testimony from Barbara Butler, Katherine Morino, Kristen Bownas, Dana Jo Piaguadio, Carole Lo Briglio, parent C.H., Patricia Henchey, and Dr. Busby.

12. On May 2, 2011, IHO Briglio issued a decision, finding a denial of FAPE for the 2010/11 school year and ordering the following relief:

The School District shall reconvene the CSE and amend F.H.'s IEP for the 2010/11 school year to provide for special education instruction using a multi-sensory, sequential, systemic, Orton-Gillingham based instructional methodology.

The School District shall reconvene the CSE and consider the student's need for speech, counseling, and books on tape.

The School District shall reconvene the CSE and review the goals on the IEP by adding goals to address reading fluency, math fluency, and speech. Additional spelling goals shall be added if it is deemed appropriate.

The School District shall reconvene the CSE and consider the student's need for extended school year services as described herein.

The School District shall fund ten weeks of five day per week, two hour per day, sessions (100 hours total) of Orton Gillingham instruction during the summer of 2011 or during another period more convenient to the parents and student. Services shall be provided by an Orton-Gillingham trained provider such as Ms. Henchey or a comparably trained provider. Services shall be compensated at a rate not to exceed \$60.00 per hour.

IHO Decision at 37-38.

13. Regarding the 2009/10 school year, while the IHO found that the annual goals were inappropriate, he declined to find a denial of FAPE, and while he found that the services provided by Ms. Henchey during that year were appropriate, he declined to order reimbursement.

14. On or around June 2, 2011, defendant initiated an appeal to the New York State Education Department's Office of State Review.

15. Plaintiff cross-appealed the portion of the IHO's decision that found no denial of FAPE for the 2009/10 school year and that declined to award reimbursement for the tutoring services provided by Ms. Henchey.

16. By decision dated July 7, 2011, a state review officer, Justyn P. Bates, sustained the appeal in part. *Application of the Board of Education of the Goshen Central School District*, Appeal No. 11-058. See <http://sro.nysed.gov/>

17. SRO Bates ordered that "those portions of the impartial hearing officer's decision dated May 2, 2011 determining that the district failed to offer the student a FAPE to the student for the 2010–11 school year and directing the district to reconvene the CSE, and modify the student's program for the 2010–11 school year are annulled."

18. SRO Bates dismissed the plaintiff's cross-appeal.

FACTUAL BACKGROUND

19. F.H. was born in 2000 and presently attends the fifth grade in the Goshen Central School District. Dist. Ex. 6 at 1.

20. She is classified as a student with a learning disability. *Id.*

21. On February 4, 2009, F.H. was evaluated by Dr. Suzanne Busby, a psychologist with the Developmental Assessment & Intervention Center in Bedford Hills. Dist. Ex. 10.

22. Dr. Busby evaluated F.H. comprehensively, employing tests of visual-motor coordination, cognitive functioning, memory and learning, oral reading, phonological processing, reversals, written language, executive functioning, and behavior. *Id.*, at 1–2.

23. She described F.H. as a “very bright girl” with a General Ability Index (GAI) in the 93rd percentile on the WISC-IV. *Id.*, at 7.

24. In particular, F.H.’s verbal comprehension abilities fell in the 97th percentile. *Id.*

25. F.H. demonstrated an 18-point gap between her verbal and non-verbal skills, indicating that “she is better able to reason with words, relative to visual information.” *Id.*, at 8.

26. Also, while F.H.’s processing speed fell in the average range, her working memory index was in the 9th percentile. *Id.*, at 9.

27. As “[t]here have been concerns regarding F.H.’s acquisition of reading skills in school[,]” Dr. Busby administered a substantial battery of tests relating to reading, including the Woodcock Johnson Tests of Achievement, Third Edition (WJ-III), the Comprehensive Test of Phonological Processing (CTOPP), the Gray Oral Reading Test, Fourth Edition (Gray-4), and the Jordan Left-Right Reversal Test, Third Edition (Jordan). *Id.*, at 11.

28. Testing revealed variability in reading skills. Thus, while F.H. scored in the average range for Broad Reading in the WJ-III (41th percentile), in Basic Reading Skills she scored below the average range (21th percentile). *Id.*

29. A review of the subtest scores indicated weak “phonological skills[,]” with her Word Attack in just the 16th percentile. *Id.*

30. On the Gray-4, “F.H. demonstrated a relatively slow reading rate and she made many errors.” *Id.*, at 11.

31. Her rate was in the 16th percentile, and her accuracy in the 9th. *Id.*, at 12.

32. Despite her below average fluency, her comprehension was excellent (91st percentile), reflecting her strength in verbal comprehension, as reflected by the WISC-IV. *Id.*

33. F.H.’s performance on the Jordan test revealed “significant visual processing weaknesses” with a score in the deviant range (1st percentile). *Id.*, at 12.

34. She struggled with phonological awareness (16th percentile), phonological memory (5th percentile) and with manipulating phonemes (9th percentile in Elision) on the CTOPP. *Id.*

35. Dr. Busby concluded that “F.H. has both phonological and visual processing weaknesses that interfere with the development of her reading fluency.” *Id.*, at 13.

36. Dr. Busby also explained that

her strong comprehension likely may have [led] people more recently to believe that she is developing proficiency as a reader. However, the fact is, she is quite smart and has a strong ability to figure out meaning, despite very weak pure decoding skills which cause many miscues and inaccuracies. Nevertheless, the process of reading is quite arduous for her, and her weaknesses indicate that she clearly meets criteria for a diagnosis of a Reading Disorder.

Id., at 13.

37. Dr. Busby also observed that F.H.’s spelling skills are very weak. On the WJ-III, F.H. scored in the low average range in spelling (15th percentile), and on the Test of Written Language (TOWL-3), her spelling errors were so significant “almost to the point where it was difficult to understand or guess at what she was trying to say.” *Id.*, at 14.

38. Dr. Busby concluded that F.H.’s “extremely weak spelling is a reflection of her dyslexia and weaknesses in phonological processing.” *Id.*

39. In her conclusion, Dr. Busby found it “understandable” that

her continued difficulty with reading would go undetected (or may have seemed to be less of a problem), because she demonstrated excellent comprehension abilities on a task in which she was asked to read passages. Her ability to read simple sentences quickly (that is, those that contained only simple, familiar words) was age appropriate as well. However, her rate of reading and her accuracy was below average for short passages of grade-level text. Her significant fluency weaknesses are related to underlying phonological and visual processing difficulties, which were clearly seen on tests designed to measure these processes (errors on the Jordan Left-Right Reversal test in the deviant range, several below average scores in phonological awareness and phonological memory on the CTOPP). Because F.H. is so bright, she often is able to use contextual cues from her reading to derive meaning. She also showed a nice ability to go back and occasionally self-correct errors, a style which is likely a result of the increased awareness of them through the intervention she has received. Nevertheless, at this time she meets criteria for a Reading Disorder diagnosis.

Id., at 19.

40. Dr. Busby thus recommended “specialized intervention to address weaknesses related to her dyslexia[,]” such as “a reading specialist” preferably “trained in the Orton-Gillingham methods.”

Id., at 21.

41. In particular, F.H. “needs individualized direct instruction with a focus on phonological and visual processing.” *Id.*

42. Dr. Busby also recommended “a smaller classroom with more supports available[,]” including “a special educator as part of her classroom.” *Id.*

43. Furthermore, Dr. Busby suggested speech therapy, books on tape heard through headphones, use of a keyboard for writing, and perhaps cognitive-behavioral therapy to address “her worries and stress about school[.]” *Id.*, at 22.

44. At a meeting of the committee on special education (CSE) held on November 16, 2009, the district developed F.H.’s individualized education program (IEP) for the remainder of the 2009/10 (fourth grade) school year. Dist. Ex. 5.

45. According to this IEP, the sole psychological and education evaluation relied upon by the CSE was the February 4, 2009 evaluation conducted by Dr. Busby. *Id.*, at 10 of 13.

46. Despite Dr. Busby’s recommendations, the CSE elected to offer only indirect (i.e., “consultation”) services from the speech/language therapist for 15 minutes per week, along with one hour per week of indirect consultant teacher services. *Id.*, at 1 of 13.

47. In addition, the CSE recommended a “Special Class Reading” in a 2:1 ratio for 45 minutes per day. *Id.*

48. The IEP does not require a reading specialist, nor any “focus on phonological and visual processing.” *Id.*, generally; compare Dist. Ex. 10 at 21.

49. F.H.’s fourth-grade annual reading goals are sparse:

F.H. will identify and read 20 high frequency words. Evaluation Criteria: 80% success over 4 weeks. Procedure to Evaluate Goal: Recorded observations. Evaluation Schedule: every 2 weeks. Primary Responsibility: Special Education Teacher.

When given a list of 20 multi-syllabic (many syllables) words, F.H. will identify the number of syllables in the word, the type of syllable, divide the words into syllables and decode the words. Evaluation Criteria: 80% success over 4 weeks. Procedure to Evaluate Goal: Recorded observations. Evaluation Schedule: every 2 weeks. Primary Responsibility: Special Education Teacher.

F.H. will maintain the ability to decode multi-syllabic word [sic] with prefixes a [sic] suffixes. Evaluation Criteria: 80% success over 6 weeks. Procedure to Evaluate Goal: Recorded observations. Evaluation Schedule: weekly. Primary Responsibility: Special Education Teacher.

Dist. Ex. 5 at 10–11, 13 of 13.

50. The CSE met again on May 10, 2010, to develop F.H.’s IEP for the 2010/11 (fifth grade) school year. Dist. Ex. 6.

51. This IEP eliminated the speech consultation, while continuing the indirect consultant teacher services. *Id.*, at 1 of 10.

52. The special class in reading was replaced with a “Special Class—ELA” in a 2:1 ration for 45 minutes per day. *Id.*

53. The reading goals were similar to those on the prior year’s IEP:

F.H. will maintain the ability to decode multi-syllabic words with prefixes and suffixes. Evaluation Criteria: 90% success over 6 weeks. Procedure to Evaluate Goal: Recorded observations. Evaluation Schedule: weekly. Primary Responsibility: Special Education Teacher.

When given a list of 10 two syllable words, F.H. will identify the number of syllables, divide the words into syllables and decode the words. Evaluation Criteria: 90% success, on 4 consecutive occasions. Procedure to Evaluate Goal: Recorded observations. Evaluation Schedule: monthly. Primary Responsibility: Special Education Teacher.

When given a list of 10 three syllable words, F.H. will identify the number of syllables, divide the words into syllables and decode the words. Evaluation Criteria: 90% success, on 3 consecutive occasions. Procedure to Evaluate Goal: Recorded observations. Evaluation Schedule: monthly. Primary Responsibility: Special Education Teacher.

Id., at 9 of 10.

54. While the fourth-grade IEP includes an extended school year (ESY) program, this service was removed from the fifth-grade program. *Id.*, at 1 of 10; compare Dist. Ex. 5 at 1.

55. Neither the fourth- nor the fifth-grade IEPs include books on tape nor any type of counseling to address F.H.’s worries and stress about school.

56. In order to ensure that F.H. did not fall further behind in her reading, the parents hired Patricia Henchey, a certified Orton-Gillingham instructor, to tutor F.H. Tr. 767–768; 763; 473.

57. Ms. Henchey delivered structured and sequential multisensory reading instruction to address F.H.'s deficits as a dyslexic student. Tr. 769–770.

58. This service lasted for eight weeks and cost \$3,000.00. Tr. 474; 786; Parent Ex. WW.

FIRST CAUSE OF ACTION

59. Plaintiffs repeat and reallege paragraphs 1 through 58 as if more fully set forth herein.

60. The SRO erred in sustaining defendant's administrative appeal.

61. The actions by defendant GOSHEN CENTRAL SCHOOL DISTRICT and the decision of the SRO, as set forth above, interfered with and denied the plaintiff his right to a free appropriate public education (FAPE) under the IDEA, 28 U.S.C. § 1400 *et seq.* and N.Y. Education Law Article 89, and the regulations promulgated under state and federal law.

62. Plaintiff requests that the Court annul the decision of the SRO, and grant the relief directed by IHO Briglio.

SECOND CAUSE OF ACTION

63. Plaintiffs repeat and reallege paragraphs 1 through 62 as if more fully set forth herein.

64. The SRO erred in dismissing plaintiff's administrative cross-appeal.

65. The actions by defendant GOSHEN CENTRAL SCHOOL DISTRICT and the decision of the SRO, as set forth above, interfered with and denied the plaintiff his right to a free appropriate public education (FAPE) under the IDEA, 28 U.S.C. § 1400 *et seq.* and N.Y. Education Law Article 89, and the regulations promulgated under state and federal law.

66. Plaintiff requests that the Court annul the decision of the SRO, find that defendant denied the student F.H. a FAPE during the 2009/10 school year, and grant the reimbursement for tutoring services sought in the hearing request.

THIRD CAUSE OF ACTION

67. Plaintiffs repeat and reallege paragraphs 1 through 66 as if more fully set forth herein.
68. Plaintiff parent initiated an impartial hearing on behalf of F.H.
69. Plaintiff prevailed at the impartial hearing by obtaining an IHO decision ordering various relief demanded by plaintiffs.
70. Portions of that relief were upheld by the state review officer's decision.
71. Plaintiff having prevailed in the underlying proceedings hereby demands reasonable attorneys' fees and costs pursuant to 20 U.S.C. § 1415(i)(3).

WHEREFORE, plaintiffs respectfully request that this Court:

- (1) Assume jurisdiction over this action;
- (2) Enter a declaratory judgment, declaring that the defendant's actions and failures and/or refusals to act have violated plaintiffs' statutory and constitutional rights as alleged;
- (3) Enter a declaratory judgment, declaring that the decision of the state review officer of July 7, 2011 is invalid and of no legal effect;
- (4) Order defendant to provide the relief ordered by IHO Briglio;
- (5) Order defendant to provide reimbursement for the tutoring services provided by Ms. Henchey as requested in the due process complaint;
- (6) Maintain continuing jurisdiction over this action until the defendant is in compliance with each and every order of this Court;
- (7) Award to the plaintiffs costs, expenses and attorneys' fees for the administrative proceedings pursuant to 20 U.S.C. § 1415;
- (8) Award to the plaintiffs the costs, expenses and attorneys' fees of this action pursuant to 20 U.S.C. § 1415; and
- (9) Grant such other and further relief as the Court deems just and proper.

Dated: Auburn, New York
October 3, 2011

Yours etc.,

A handwritten signature in black ink, appearing to read 'AKCuddy' with a stylized flourish at the end.

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