

COMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
BUREAU OF SPECIAL EDUCATION APPEALS

In Re: Bentley¹

&

BSEA #1806824

Grafton Public Schools

DECISION

This decision is issued pursuant to M.G.L. c.71B and 30A, 20 U.S.C. §1401 *et seq.*, 29 U.S.C. §794 and the regulations promulgated under those statutes. A Hearing was held on May 7, 2018 at Catuogno Court Reporting in Worcester, MA. The Parents proceeded *pro se*. The School was represented by Attorney Alisia St. Florian.

The official record of the Hearing includes exhibits submitted by the Parent marked P-1-4, P-6-8, P-12-21 and P-23; exhibits submitted by the School marked S-1-16 and approximately 2 hours of recorded testimony and argument. The Parties submitted written closing arguments on May 30, 2018 and the record closed on that date.

ISSUE

The issue for Decision at hearing was set out in an April 3, 2018 PreHearing Order:

Whether the School must accept as a reasonable accommodation to the Student's disability a Parent-secured, outside of school, course of instruction in the German language, in satisfaction of the School's High School credit and distribution requirements for the award of the diploma?

¹"Bentley" is a pseudonym chosen by the Hearing Officer to protect the privacy of the Student in documents available to the public. A derivative pseudonym, "Mr. B.", is used for the Parent.

PARENTS' POSITION

Bentley is an academically high-achieving student with a disability who is expected to earn a high school diploma. He requires modification of the High School's foreign language graduation requirement as an accommodation to his social/emotional/behavioral disability. He can successfully meet the district's foreign language requirement if he pursues a course of study in the language he has expressed interest in, German. Grafton High School does not offer a course in German language. The Parents have arranged for instruction in German outside of school hours and request that Bentley be awarded school credit for it.

SCHOOL POSITION

High school credit for time-in-learning, distribution and grading purposes for determination of eligibility for the award of a high school diploma is a general education decision. For academic coursework completed outside of the Grafton Public School to be given credit on a student's transcript, the course must be accredited by an independent curriculum evaluation body. The Parents' chosen mode of German language instruction is not accredited and thus cannot be awarded credit for any purpose by Grafton High School. The Parents declined to pursue at least three options for an accredited course of study of German language that would qualify for transfer of high school credit. Furthermore, there are no evaluations or recommendations to support either a waiver, or a modification, of Grafton's foreign language requirement for Bentley.

SUMMARY OF THE EVIDENCE

1. Bentley is a 15 year old 9th grade student at Grafton High School. He is eligible for and has received special education services through the Grafton Public Schools to address a social/emotional/behavioral disability due to an autism spectrum disorder. In March 2017 the Team met to discuss Bentley's transition to the Grafton High School. The Team decided that Bentley would follow a full inclusion academic program with a 1:1 behavioral support aide. The sole goal in the IEP was improvement in Bentley's social/emotional/behavioral functioning in school. In lieu of embarking on the study of a foreign language Bentley would have a daily academic support period in order to provide additional emotional/behavioral support if/when needed. The IEP also provided for a weekly thirty minute session of social skills training with a speech-language pathologist. The Parents participated in the Team meeting and accepted the proposed 9th grade IEP. (Mr. B., Babineau)
2. Grafton Public Schools requires credit for two years of study of a foreign language, among other credit requirements, for the award of a high school diploma. To that end Grafton offers French, Spanish and Latin courses at the high school. Grafton will accept equivalent credits from other accredited courses of study offered by high schools, colleges or independent educational programs in satisfaction of its foreign language requirement. (Babineau, Calo)

3. In September 2017 Bentley indicated to his parents that he would refuse to take up any study of French, Spanish or Latin offered by Grafton High School. He also stated that he was interested in learning German. Bentley's parents arranged an individual course of instruction in German Language and Culture from a neighbor who is a retired college professor of German. Bentley has participated consistently in this instructional arrangement after school and on weekends since September 2017. (Mr. B.)

4. In September 2017 the Parents and some of Bentley's regular and special education Team members met to discuss Bentley's participation in math class. The Parents mentioned that Bentley was receiving instruction in German and asked about the possibility of receiving Grafton High School credit for it. They were told that award of credit for a general education course was a decision to be made by the general education administration. The Parents did not, at that time, request a disability-based accommodation. The Parent did not, at that time, reject any portion of the then current IEP. (Mr. B., Babineau)

5. In November 2017 the Team met for an annual review. The Team discussed Bentley's transition to the High School and determined that it was going well. No changes to the accepted 2017-2018 IEP were suggested. There was some, inconclusive, discussion of the Parents' earlier request for award of academic credit for Bentley's outside study of German. (Babineau; Mr. B., S-10, S-5; see also S-16)

6. Grafton reissued the 2017-2018 IEP and behavioral support plan. In response the Parents partially rejected the proposed 11/17-11/18 IEP requesting that the IEP be amended to:

“provide reasonable accommodations for non-preferred activities, especially those that are necessary to meet high school graduation requirements. We believe we have provided a reasonable alternative for the language requirement yet the School has provided no alternative accommodations or any explanation as to why the outside language training being given is not acceptable.”
(P-3; P-2; S-2)

7. Grafton conducted Bentley's three year re-evaluation during the fall 2017. School Psychologist Ashley Wheeler conducted a psychoeducational evaluation in November 2017. She reported that Bentley scored in the average to very superior ranges of cognitive functioning on the WISC-V, a standardized measure of intellectual functioning. This performance was consistent with scores achieved on previous intellectual function testing, academic achievement test results and with unmodified grades awarded in Bentley's college prep academic courses. Ms. Wheeler made recommendations for accommodations to relative weaknesses in Bentley's organizational and production skills.

There are no recommendations for modifications to general academic content, instructional techniques or curricular requirements. (S-12)

8. Laura Koehler, a speech pathologist, conducted a speech-language evaluation in November 2017. She reported that Bentley performed in the average to above-average range on all standardized measures of verbal functioning. Nevertheless she observed that Bentley retained some difficulty picking up on nuances of social language in some contexts and could demonstrate inappropriate conduct when reacting to specific social situations. She recommended that Bentley continue the then current course of study, including participation in a weekly social skills group. She did not recommend any modifications to the general education course content, expectations or requirements. (P-7, S-13)

9. Stephanie Morrissette, Behavior Specialist, conducted observations in Bentley’s high school program and performed data analysis in October and November 2017. She reported that Bentley:

- exhibited great strengths in many areas of behavior including his ability to communicate with others....
- is used as a model student in many of his classes.....
- is displaying high rates of cooperating in a group setting...
- has shown growth from the previous school year...
- is able to maintain his skills of cooperation and interjecting opinions or ideas during appropriate times...

Ms. Morrissette did not make any recommendations for modifications to the general education course schedule, content, expectations or requirements. (P-6, S-14)

10. The Team reconvened on December 8, 2017 to review the results of the triennial re-evaluation. The Parents requested that the IEP section “Present Level of Educational Performance Part B” include the language: “Accommodations provided for non-preferred activities.” The Parents believed that the addition of this language would support their request for award of high school credit for Bentley’s study of German outside Grafton High School. The Team determined that Bentley’s then current IEP provided accommodations to him in situations where he became frustrated, including when asked or required to engaged in non-preferred activities. The accommodations included: direct support from his 1:1 aide, implementation of the Behavior Support Plan, calming activities such as taking space, walking, getting a drink, providing choice of alternate activities, etc. As the primary goal of Bentley’s IEP was to increase his repertoire, and appropriate use, of behavioral skills to be used when faced with non-preferred activities, and as Bentley had demonstrated significant and consistent growth in this area, the Team determined that retreating to avoidance of non-preferred activities would not serve Bentley’s educational interests. Thus the Team declined to include the accommodation language requested by the Parents in Bentley’s IEP. (P-2; S-2; S-3; Babineau)

The Team also discussed whether Bentley continued to require a daily academic support period, specialized transportation and a behavioral support aide. The Team determined that Bentley did not use or require specially designed instruction from a special education teacher during the academic support period. Using that period instead for an elective, as Bentley had requested, would provide an educational and social benefit to him. The Team also determined that Bentley had demonstrated significant behavioral growth across settings

and thus that neither specialized transportation nor a behavioral support aide was warranted. (P-2; S-2; S-3; S-5; Babineau)

The Team meeting was suspended to permit Grafton and the Parents time to explore resolution of the Parents' request for credit for Bentley's out-of-school study of German. (Babineau)

11. Tracey Calo, Assistant Superintendent for Grafton Public Schools, testified that Grafton Public Schools awards high school credit for the successful completion of academic study through other independently accredited programs – both in brick and mortar schools and on-line. She stated that the Parents' credit request came to her attention late in the fall 2017 semester. She consulted with the high school principal, Mr. Pignataro, and the district's special education director, Mr. Lundwall, and researched options for accredited on-line programs of study of German which Grafton could support. She called surrounding school districts to determine whether Bentley could participate in a German language course. None offered German. Ms. Calo also learned that no other district awarded high school credit for an unaccredited course of foreign language study. (Calo) In December 2017 Ms. Calo offered the Parents a choice between two accredited on-line programs of German Language instruction: Keystone and Brigham Young University (P-18; P-19; S-15). She advised the Parents that Grafton would fund Bentley's enrollment in one of the programs and award high school foreign language credit on successful completion.

The Parents declined both options. They objected to BYU's requirement that the Student participate by webcam, that courses "were likely" to be taught by less than full professors and that BYU was not a secular institution. They also were unhappy that the subject covered in the required discussion modules might not be one of Bentley's preferred subjects. The Parents then appealed to the Superintendent of the Grafton Public Schools. He directed Ms. Calo to continue researching other options for accredited on-line foreign language study. (Calo; P-20, P-3)

12. The Team reconvened on January 8, 2018. The Team discussed the on-line options for supporting Bentley's interest in the study of German. Grafton offered to provide support for the on-line instruction and any necessary instructional, technical or behavioral accommodations during the daily academic support period. Instructional support could be provided directly to Bentley through individual assistance by the special education teacher or by the Parents' chosen instructor. The Parents rejected those options.

The Team finalized the changes discussed during the December 8, 2017 Team meeting: elimination of the daily academic support period during the 2018-2019 school year to permit Bentley to participate in elective classes; reduction of 1:1 support from a behavioral aide to an instructional assistant and withdrawal of specialized transportation and extended day/year special education services. These were memorialized in the proposed IEP dated December 8, 2017-December 8, 2018. (P-2, S-2) The Parents were advised to pursue their request for foreign language credit through the district's administrative hierarchy. On February 12, 2018 the Parents accepted the proposed full inclusion placement, but rejected that portion of the proposed IEP that failed to provide for high school foreign language credit for Bentley's independent study of German as an accommodation to his disability.

13. Throughout January and February 2018 Ms. Calo continued to search for accredited German language programs that could address the Parents' concerns. She discovered Connections Academy by Pearsons which is offered through the Virtual High School. Pearsons offers four levels of German language instruction, all taught by teachers licensed to teach German. Student knowledge is assessed at the beginning of the course so that content is not repeated. No webcam is required. This option was presented to the Parents by the Superintendent. The Parents rejected it. (Calo; S-15;S-16)

14. Mr. B. testified that the Parents agreed that Bentley's 9th grade school would not include a study of a foreign language. He stated that he arranged Bentley's study of German beginning in September 2017 because his neighbor would only be available for instruction for two years. He did not consult with the School before arranging for the German language instruction. Mr. B. testified that Bentley's current instructor is highly qualified, that Bentley is engaged in and committed to learning German and, therefore, that an award of high school credit is required (Mr. B.)

15. There is no evidence that the course of instruction for which the Parents are seeking high school credit is accredited by any independent curriculum assessment body.

16. Due to his high academic achievement Bentley is not eligible for a waiver of Grafton Public Schools' foreign language requirement. (Calo)

FINDINGS AND CONCLUSIONS

There is no dispute that Bentley is a student with special learning needs as defined by 20 U.S.C. §1401 *et seq* and is therefore entitled to receive a free appropriate public education. The extremely narrow issue before the BSEA is whether the district must accept, as a necessary component of that education for Bentley, an unaccredited program of instruction in the German Language. The statutory basis of Parents' arguments in support of their position that it must is not clearly articulated. However, since Parents are proceeding *pro se*, I analyze the pertinent facts and applicable standards under both statutes that may apply to Bentley's circumstances: the IDEA and Section 504 of the Rehabilitation Act of 1973.

After careful consideration of the available evidence, and the arguments of the Parents and the Grafton Public Schools, it is my determination that neither statute affords the parents the relief they seek through the BSEA. The Parents have failed to prove by a preponderance of the evidence that the 12/2017-12/2018 IEP proposed by Grafton is not reasonably calculated to provide a free appropriate public education to Bentley. *Schaffer v. Weast*, 546 U.S. 49 (2005). The Parents also did not prove by a preponderance of the evidence that Grafton failed to offer the reasonable accommodations to Bentley's disability that would permit him to access the general education curriculum and facilities on the same basis as students without disabilities. My reasoning follows:

FAPE

A free appropriate public education, often referred to as “FAPE”, is a set of specialized instructional methods and services, curricular modifications, related services, equipment, environmental adaptations and educational settings that are specifically tailored to an individual student’s unique learning needs and designed to provide a meaningful educational benefit to the student. 34 CFR 300.300(3) (ii); *Endrew F. v. Douglas County School District*, 137 S.Ct.988, 580 U.S.__(2017). What constitutes a meaningful educational benefit must be determined in the context of the student’s potential to learn. At the least, however, the proffered plan for educational services, the Individualized Education Program or “IEP”, must be geared to producing demonstrable improvement in the educational and personal skills identified as special needs. *Lessard v. Wilton-Lyndeborough Cooperative School District*, 518 F.3d 18 (1st Cir. 2008); *Lenn v. Portland School Committee*, 988 F.2d 1083 (1st Cir. 1983).

In the instant matter the uncontroverted evidence shows that during the 2017-2018 school year Bentley was making effective, measurable progress in the one area identified as his special need, age appropriate conduct in the school setting, pursuant to the IEP accepted by his Parents and implemented by Grafton. (S-5; Babineau) There are no educational, psychological or behavioral recommendations for a change in service type, delivery or setting. On the contrary, all of the evaluations conducted during the fall 2017 as part of Bentley’s triennial review noted academic and behavioral growth. None recommended an alternate or substitute program of foreign language instruction for Bentley. None indicated that he would be unable to pursue any of Grafton High School’s foreign language course offerings due to his disability, that he required modifications to those courses or disability-related accommodations to properly access them. None found that pursuing a Grafton foreign language course would impede progress toward his IEP objectives. Indeed, the accommodation requested by the parents as an addition to other accommodations listed on the PLEP-B page of the 2017-2018 IEP, the choice to “opt out of a non-preferred activity”, would eviscerate Bentley’s IEP. The IEP is centered on developing age and setting appropriate skills Bentley can use to cope with situations and demands that he does not expect or like. Following a disfavored academic course is an opportunity to learn, practice and routinize those necessary coping strategies. (Calo; Babineau. §10)

The Parents acknowledge that the proposed 2017-2018 IEP is in all other respects appropriate and effective. The Parents do not claim, nor does any evidence support the proposition that, the IEP process was procedurally defective. I find, therefore, that Grafton acted responsibly in rejecting the Parents’ request for an accommodation that had no reasonable educational basis.

Considering the proposed 2017-2018 IEP as a whole I find that it incorporates the findings and recommendations of all expert evaluators, teachers and parents and reflects the consensus of the Team for appropriate service delivery. It is a comprehensive and thoughtful document which is clearly calculated to address Bentley’s behavioral needs while affording him the opportunity to participate in the general education curriculum and setting.

The preponderance of the evidence supports the conclusion that the Parents acted both prematurely and without an educational basis when they arranged German language instruction for Bentley. The Parents had participated in a Team meeting at which Grafton’s foreign language requirement was discussed. They agreed to postpone Bentley’s exposure to a foreign language until after the 2017-2018 school year. They accepted a 2017-2018 IEP reflecting that scheduling agreement. Then, during the “life” of that agreement, they unilaterally arranged German language instruction for Bentley without notice to the School. They did not, at that time, assert that Bentley could not receive a free appropriate public education in the 9th grade without an out-of-school German language course. The instruction began in September 2017, according to Mr. B., only because the instructor “would only be around for two years.”

2. SECTION 504

Section 504 of the Rehabilitation Act of 1973, 29 USC §794(a), is an anti-discrimination statute that provides that “no otherwise qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance.” *Id.*, 34 CFR §104.4(b)(1). The BSEA is authorized by MGL c. 71B§2A and 603 CMR 28.08(3)(a) to adjudicate any issue involving the denial of a free, appropriate public education guaranteed by §504 of the Rehabilitation Act. To prevail on a claim under §504 in the public education context (in which we can assume the receipt of Federal funding), a parent must show that the student has a qualifying “handicap,” that he or she was denied access to, or the benefit of, a program or activity of the public entity for which he or she is “otherwise qualified,” on an equal basis to a person without a disability, and that such denial was based on his or her disability. The requirements for provision of a free appropriate public education under Section 504 generally mirror those set out in the IDEA. The implementing regulations which appear at 34 CFR 104 contain language specifically applicable to secondary education. They provide that a school district’s compliance with an IEP developed in accordance with IDEA procedures generally satisfies an entity’s Section 504 obligations with respect to that individual student. 34 CFR 104.33 (b)(2); 34 CFR 104.34(a).² Having found that the 2017-2018 IEP proposed by Grafton

²There is often confusion about the terms used by overlapping statutes/regulations governing the rights of people with disabilities in specific public and private educational and occupational spheres. In the context of a Section 504 analysis “free appropriate public education” refers to the provision of regular or special education and related aids and services that are designed to meet individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and is based upon adherence to procedures that satisfy the Section 504 requirements pertaining to educational setting, evaluation and placement, and procedural safeguards. “Reasonable accommodation” is a term used in the employment context to refer to modifications or adjustments employers make to a job application process, the work environment, the manner or circumstances under which the position held or desired is customarily performed, or that enable a covered entity’s employee with a disability to enjoy equal benefits and privileges of employment; this term is sometimes used inaptly to refer to related aids and services in the elementary and secondary school context or to refer to academic adjustments, reasonable modifications, and auxiliary aids and services in the postsecondary school context. “Reasonable modification” is a term in a regulatory provision implementing Title II of the ADA, a statute closely intertwined with Section 504. It requires public entities to make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

satisfied the IDEA's substantive and procedural requirements I need not revisit that analysis here. I turn directly to the question then, of whether, in refusing to accept the course of instruction in German language arranged by Bentley's Parents in satisfaction of the district's high school credit requirements, Grafton discriminated against Bentley on the basis of his disability?

The weight of the evidence is clear and convincing. It did not. Standards for high school graduation are set by the individual school district in compliance with minimum criteria dictated by the Commonwealth. These standards are general education standards. The services, protections and procedures available to students with disabilities pursuant to the IDEA and Section 504 are tools to equip those students with the means to achieve the general education standards. Whether to accept an alternate course of study as equivalent to, or in substitution of, any particular high school graduation requirement is ultimately a general education decision, which must be made in concert with a public school's Section 504 obligations.

First I note that, here, there is no persuasive evidence that Bentley cannot, with appropriate instructional and behavioral supports, access any of the three foreign language courses Grafton High School offers to all its students. Next, the uncontested evidence shows that Grafton has a district policy of awarding transfer credit only to courses of instruction that are accredited by a recognized, independent educational accrediting authority. This policy is applied neutrally to all requests for credit transfer. The Parents did not show otherwise. There is no evidence that, when applied neutrally, Grafton's credit transfer policy operates to disadvantage students with disabilities. There is no evidence that this policy has been used to deny credit transfer requests to students with disabilities in general or to Bentley in particular. Instead, Grafton offered Bentley a minimum of three alternative courses of instruction in his preferred language, any of which would satisfy the district's accreditation requirement, and ensure that Bentley's IEP accommodations would be implemented, at no cost to the family.³ There is no evidence that would support a reasonable conclusion that Bentley could not access an accredited on-line course of study of the German language with the tailored in-school supports Grafton offered to him. Therefore, I find that Grafton's response to the Parents' request for foreign language credit accommodation was more than reasonable. It was generous.

Finally, while Section 504 contemplates a separate meeting to consider whether a modification to a regular education program, requirement or setting is necessary in order for a student to receive a free appropriate public education or to have equal access to general education programs and services, it is not required. A special education Team meeting may consider and address any Section 504 concerns. Here, where the Parents' request for an award of general high school credit for their chosen instructional program was discussed timely and extensively in at least two Team meetings, in additional meetings with general education administrators and through email correspondence, I find that any potential procedural misstep was insignificant and caused no educational injury to the Student.

³The options available to the Parents were: a.) an on-line course through Keystone; b.) an on-line course through BYU; c.) an on-line course through Pearson; d.) an on-line course supported by a Grafton special education teacher; e.) any accredited on-line course supported by the Parents' chosen instructor as long as that support occurred during the school day within the high school.

ORDER

The Parents are not entitled to public funding, or recognition for credit purposes, of educational services they secured privately to supplement or replace services outlined in an otherwise adequate, and accepted, IEP. The 2017-2018 IEP proposed by Grafton is reasonably calculated to provide a free appropriate public education to Bentley. Grafton met its non-discrimination obligations to Bentley under Section 504 by carefully considering the family's request for an award of credit for a privately arranged program of instruction in foreign language and offering the family acceptable and available alternatives to achieve the same result in the same manner and according to the same criteria as it considered similar requests from students without disabilities.

By the Hearing Officer

Lindsay Byrne
Dated: June 8, 2018