

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

The Student v. Waterbury Board of Education

Appearing on behalf of the Parents:

Pro Se

Appearing on behalf of the Board of Education:

Attorney Maurice Mosley
Waterbury Corporation Counsel
32 Linden Street
Waterbury, CT 06702

Appearing before:

Attorney Deborah R. Kearns
Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

The request for placement at the Learning Incentive, an out of district private placement, in order to remediate reading and writing deficits to a minimum seventh to eight grade level.

PROCEDURAL HISTORY:

The hearing convened on November 26, 2002 and February 19, 2003. The identification numbers on the Board's exhibits contained errors, some of the errors were discussed on the record at the hearing. The hearing officer found the record contained exhibits with missing pages and mis-numbered pages, and ordered the parties to agree to a date for hearing to correct the record. Several weeks elapsed, from the time of the request, until the time the hearing convened on February 19, 2003. On February 19, 2003 the parties agreed, on the record, to extend the date of final decision and order. There appeared to be another error in the record. The parties were contacted and asked to review the exhibits to confirm they are correct. The Board's attorney responded; the parents did not respond to the mailed communication. The record closed on April 4, 2003.

SUMMARY:

The child made minimal progress since, 1999, in specific special education classes. The parents requested the student attend a private, out-of-district, placement to speed-up his rate of progress. Recent evaluations on their face appear to support the parents' claims. The local educational agency ("LEA") presented credible testimony that the child's

progress rate increased due to program changes implemented over the past two school years. The LEA claims some of the progress is not measured adequately on standardized achievement tests. Progress made in programs implemented this year would not show measurable gains until later in the year.

FINDINGS OF FACT:

The child was first identified for special education in December, 1997, when evaluated due to reading and writing difficulties. Concerned about the child's progress, the parents had the Connecticut Children's Medical Center, ("CCMC") perform "The Diagnostic and Perceptual Cognitive Assessment", dated 3/4/98 and the "Psychological Evaluation", dated 3/20/98. Fourth grade achievement test place the child's reading at 2.0 grade level, his writing skills at 2.0 grade level and his spelling at 1.5 grade level. The Individual Education Planning Team (IEP team) concluded more modification would be necessary for fourth grade. (Exhibit B-16, B-24, B-25, Testimony, Parent)

In subsequent school years, 1999-2002, the child performed at grade level in some subjects, so long as modifications were in place. (See student's report cards). During the summer and early fall of 2002, the parents were concerned and frustrated the child had not improved substantially in reading or writing for the past three years. Test results indicated the student was at 3.5 grade level in reading, 3.6 grade level in writing and 9.2 grade level in broad knowledge. The parents conclude in reading and writing the student was 2.0 years behind grade level in the fourth grade and 3.5 years behind in the seventh grade. (Exhibit B-3, B-4, B-29, Testimony, Parent)

If the child's progress were to continue in a similar pattern, the student would advance through high school without being able to read and write. The parents requested a due process hearing. The parents did not claim there were any procedural violations on the part of the local educational agency (LEA). Following the parents' request for due process, a triennial review took place. (Exhibit B-4, B-5, Testimony, Parent)

When the parents were, cross-examined, they conceded the teachers made glowing reports to them about the child's progress; teachers stated the child's classroom progress was adequate with modifications and in some respects superlative. The child's interim reports and grades for the first marking period for the 2002-2003 school year, indicate the student is doing fine. The parent stated reading and writing are the main areas of concern. The parents believe all reading skills require improvement. (Testimony, Parent)

The special education supervisor testified the child was first identified as eligible for special education in December, 1997. The school performed psychological evaluations and developed a program for the child. The program developed to meet the student's needs included 1.5 hours of resource room and one hour of speech and language therapy per week. The program was modified in 1999, to increase time in the resource room and add occupational therapy. In June, 1999, the individual education program ("IEP") team recommended the student's placement be changed to the learning center. (Exhibit B-19, B-20, B-27, B-28, Testimony Special Education Supervisor)

Upon re-evaluations in June, 1999, the IEP team determined that a severe discrepancy existed between the student's ability and achievement in basic reading, reading comprehension and written expression. Achievement testing, aptitude testing and the CCMC evaluations are the bases for the conclusion. The supervisor of special education specifically stated the June, 1999, IEP meeting utilized the CCMC evaluations, claiming the meeting occurred about the same time the evaluations were prepared. The supervisor contradicted herself in later testimony stating the CCMC evaluations were considered 15 months after the date they were prepared. There was no testimony about the timing of the school's receipt of the documents. (Exhibit B-15, Testimony, Special Education Supervisor)

In June, 1999, the IEP team developed a program based on the triennial speech and language evaluation, the special education teacher's report and the CCMC evaluations. The student was to continue work on articulation, support organizing thoughts, words and sentence formation, the quality of sentences and sequencing skills. Information was to be presented, verbally and curriculum was to be adjusted to build on the child's [verbal] strength. The child was to receive one-half (.5) hour per week of occupational therapy. (Exhibit B-15, B-16 Testimony, Special Education Supervisor)

The CCMC evaluation dated 3/26/98, recommends, addressing attention and concentration issues and incorporates the CCMC, Perceptual and Cognitive Assessment, dated 3/4/98, for further recommendations. Placement should be in a structured but nurturing mainstream classroom. It is critical he obtain individualized reading instruction, to address deficits in reading and spelling and paraprofessional support in the mainstream classroom to assist in that setting. Participation in an integrated language arts program with a strong emphasis on the developing phonetic skills is appropriate. The report contains specific examples of instruction for phonics, spelling and recommends assistance with written expression. (Exhibit B-24, B-25 pages 3-7, Testimony, Special Education Supervisor)

The IEP for the current school year provides the child receives language arts, math and reading in the special education resource room. The child's math performance is satisfactory; math is his strength with a current average of (76) seventy-six. The grade is low due to test and quiz grades which have negatively effected his average. He is receiving instruction with a seventh grade book along with supplementary materials in the resource room. The setting provides a slower pace, more practice, a hands-on approach using manipulatives, auditory and visual materials. The child understands basic operations but has low test grades. The resource room teacher believes the child is capable of a higher, average grade than (76) seventy-six. (Testimony, Resource Room Teacher)

The class structure for language arts focuses on spelling, vocabulary and writing. Writing instruction is broken down into organizing skills, understanding the reason for writing, and adding details to make written assignments more structured and organized. The child's current grade in language arts slipped, lately, because his homework average

slipped. The grade is headed back up to an average grade of (70) seventy. The teacher believes the child has made good progress since he began working with the child at the beginning of the year, particularly in his class work. (Testimony, Resource Room Teacher)

In reading, the child has difficulty with decoding, but his average grade is (90) ninety and his performance is on grade level. Class instruction, includes an integrated approach to reading, using a top-down model which utilizes whole-language instruction and mixed, phonetic, structural analysis. Currently, the top-down model is recommended, for learning disabled students. Class instructions focuses on print skills, which is analysis of printed word, vowel combinations, consonant combinations, phonetic rules, pronunciation, structural analysis of poly-syllabic words, learning how to decode affixes, and identifying root words and compound words. Fluency instruction is utilized to promote independent reading. The resource room teacher reads to the all the students to model how a good reader should read. The classroom teacher notes an improvement since the beginning of the year. The student is a hard worker. (Exhibit B-19, Testimony, Resource Room Teacher)

Math instruction for the current school year includes algebra instruction, at the seventh grade level. With regard to the child's progress in language arts, the teacher sees improvement in written communication skills, his grade average is (65) sixty-five. The grade has gone up recently. The child is able to perform with less assistance. The objectives developed to meet the annual IEP goals, are to use a graphic organizer, write five to six paragraphs and finally to edit for mistakes of grammar, punctuation and spelling with assistance from the teacher. (Exhibit B-1, pages 20, 25)

The child's most recent evaluation is dated October, 2002, and includes both informal and standardized language assessments. Test results indicate areas of relative strength, but show lower performance in the areas of written expression and phonemic awareness. Education evaluations dated October 23, 2002, show low performance in basic reading skills, basic math skills and basic writing skills. Average performance in reading comprehension and math reasoning predicts, the use of age-level material in these subject areas will be manageable for the child. Age-level tasks will be difficult in reading and age-level tasks in basic reading, decoding and writing will be very difficult. This information was used to develop classroom modifications, and the IEP goals and objectives. (Exhibit B-1 page 13, B-5 page 3)

The resource room teacher refers to the Woodcock-Johnson Psycho-Education Battery Revised (WJ-R 1989) Tests of Achievement. The student is above average in Broad Knowledge but below average with significant weakness in Broad Reading and Broad Written Language. (Exhibit, B-3)

The child's grade modifications permit the teacher to increase the child's grade for "effort and work" and provides that the child's grade will not decrease due to spelling and handwriting errors. (Testimony Special Education Teacher)

The resource room teacher uses the QRI-3 to test progress, regularly. The child is monitored during oral reading to track the number of miscues. Regular monitoring provides information for determining when the student is ready to move onto higher level material. Seventh grade level material is too difficult for the child, at this time. The teacher models reading for the child by reading aloud to the child when seventh grade material is used. The child's current reading level is at a 4.5 to 5.0 grade level. Despite low test scores, there is reason to believe the child reads above his tested grade level. Class material includes non-fiction, fiction, newspapers and magazines. The precise level of these materials is not known, but the child's miscues while reading the unrated material is measured and comprehension is reviewed for success with the materials. The child is following the seventh grade "Choices" reading program, when the teacher models reading. The resource room teacher believes he is already providing the type of reading intervention which will help the student catch up to grade level reading. The resource room teacher believes more one-to-one reading and more outside reading will help the child catch-up. Instruction is provided in the resource room for fourteen students and an aide assists the teacher. (Testimony, Resource Room Teacher)

Modifications for the regular education classroom includes a multi-sensory approach for instruction, highlighting key words, using visuals such as pictures and charts, repeating instructions and checking the child's understanding of instructions, Verbal instructions are reinforced with auditory instruction with visual aides. (Exhibit B-1 page 13)

The speech pathologist has prepared two IEPs for the child and worked with the child for more than a year. She has a special education certification in two areas, speech and language pathology, and articulation. The student has met the goals established in the first IEP for speech and language, dated 11/31/01, based on the last objective assessment. The child's scores on the Comprehensive Assessment of Spoken Language (CASL) all fell within the average range. The child's scores on the Peabody Picture Vocabulary are in the eighty-second (82 %) percentile. (Exhibit B-2, B-6, B-7, B-8, Testimony, Speech Pathologist)

On the Test of Written Language (TOWL-3), five subtests were administered, with a generally low performance in the fifth (5th) percentile. The speech pathologist explains the scoring on the TOWL-3 test is stringent, the child's writing mechanics pulled down elements of written expression since the child could not get credit for work which adequately expressed an idea but did so with poor mechanics. Other aspects of the test relied on reading skills which ultimately pulled down the child's score on the test for logical sentences. Phonemic awareness deficits, pull down the language score which is generally an area of strength for the child. The speech pathologist believes the child's written skills are an area where he will continue to make gains. (Exhibit B-2, Testimony, Speech Pathologist)

To address phonological awareness the speech pathologist uses excerpts from the "Lips Program" which is the "Lindamood-Bell" sequencing of phonemes program. The program uses manipulatives, augmented by auditory input. The child shows increased phonemic awareness. (Testimony, Speech Pathologist)

The speech pathologist corroborates the testimony of the resource room teacher and mainstream teacher. The child demonstrates an ability to request help when needed and does quite well in his mainstream subjects. Most special education support for the child focuses on writing components of the mainstream classes. The child has made remarkable progress since last year. The speech pathologist limits her testimony to the time she has been involved with the student in which she has witnessed the student's progress, some of which is difficult to measure on standardized testing. (Testimony, Speech Pathologist)

The speech pathologist explains why the standardized test scores, which place the student well below grade level, cannot be the only measure of progress. She cites program improvements with the resource room teacher's cutting edge technology and the speech pathologist's curriculum implementing the Lindamood-Bell "Lips Program", both are new programs for the child. Some of the child's progress is observed in class, some of which is not measurable on the standardized testing. Some instruction involves recently implemented program changes and will not yet result in measurable differences in standardized testing. The child has shown progress in that he is less resistive to writing; and he demonstrates increased maturity. The testimony of the speech pathologist and the resource room teacher are credible and not contradicted by any other experts who would dispute the child has actually made progress. (Testimony, Speech Pathologist)

The child is not shy in mainstream classes. On his first day of school he requested seating up front. He is eager to answer questions in class. His homework is usually complete. The child's test and quiz grades are in the eighties and the report card grade is (85) eighty-five for the marking period. A written planner is the primary intervention the student uses for science class. The teacher provides a written summary for all the students because the text is difficult. The child from time to time takes advantage of a compact disc, which accompanies the text, providing him with a multi-sensory approach to the material. The child's auditory learning is exceptional, he learns a lot from lectures. The class materials include a lot of graphic materials to provide visual input, and labs provide another mode of learning. The child demonstrates high performance in the lab work. When cross-examined by the parent the classroom teacher was able to distinguish the child's science class performance from that of any other student who simply did not read the material for class, because the student demonstrates an interest in the material and prepares homework despite having reading difficulty. (Exhibit B-1 page 21)

CONCLUSIONS OF LAW:

There is not dispute between the parties, that the child is eligible for special education and entitled to a free and appropriate public education (FAPE) pursuant to the Individual with Disabilities Education Act ("IDEA") 20 USC 1401 *et seq.*, and the provisions of the Connecticut General Statutes section 10-76 *et seq.* The parents request the child receive education in an out-of-district placement at a facility where he can receive intensive reading and writing intervention, with the objective of closing the gap, as much as possible, in the student's performance as compared to the performance of typical peers.

The parents are concerned the child's progress over the past three years is minimal. The United States Supreme Court in, *The Board of Education of the Hendrick Hudson Central School District v. Rowley*, 459 U.S. 176 (1982), proposed a procedure for analyzing whether FAPE is offered to a child. In *Rowley*, the Court provides a two-prong inquiry for reviewing programs offered to children. First the Court requires that the procedural requirements of IDEA are met. The parents do not raise any issues of procedural deficiencies, and there was no evidence presented at the hearing to suggest procedural requirements were not met.

The second prong of *Rowley*, requires the individualized educational program (IEP) offered by the LEA must be "reasonably calculated to enable the child to receive an educational benefit. The benefit cannot be trivial, *Rowley*, at 3043-44. Subsequent, Court decisions interpreting educational benefit, elaborate on the question of how much benefit is sufficient to be meaningful. The act requires educational *progress* rather than a program that is merely of benefit. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 183 (3rd Cir. 1988), *cert. denied* 488 U.S. 1030 (1989). (Emphasis original).

The measure of progress which is meaningful, or of benefit, to the child in the present case is entirely dependent on his individual needs. It is possible, since there was no testimony to the contrary, that the student is not capable of making more progress than he is making in the program, in which he currently participates. The evidence provides, however, the child participates in mainstream social studies and science courses, earning adequate grades with a minimal level of support. The child's ability to work hard, complete assignments and general cognitive abilities as outlined on the CCMC evaluations, establishes the full scale I.Q. scores of 109 and above average performance on the Woodcock-Johnson, Revised (WJ-R 1989), Test of Achievement, administered in October, 2002. The child's ability to make progress, therefore, is assumed.

It is not clear from the evidence, whether the child is capable of making progress in the specific areas of reading and writing. The programs planned for the child, in the first few years following his identification, may not have had sufficient intervention since it provided 1.5 hour of resource room and one hour per week of speech and language therapy. The IEP team moved the child's placement to the Learning Center in 1999. The testing in October 2002, establishes the student was able to make progress since the 1998, CCMC testing. The resource room teacher estimates the child has progressed in reading to a 4.5 to 5.0 grade level further supporting a conclusion that the child is very capable of making progress.

The testimony of the resource room teacher is convincing, particularly because the content of the program changed significantly during the 2002-2003 school year. The child is using seventh, grade-level, math material. The reading and writing curriculum changed to include non-graded material such as newspapers and magazines. The student has an opportunity to hear grade level, reading material read aloud in class. The teacher utilizes objective measures to reach that conclusion. The child is tested during oral

reading with the QRI-3 test which measures miscues. There are fourteen students in the resource room, when questioned the resource room teacher stated more one-to-one reading instruction and more outside reading is likely to help the student catch-up.

The speech pathologist's testimony is credible as to her claims the student has made progress since the time she began working with him during the 2001-2002 school year. The child's grades and achievement tests show growth; including some growth in areas which would not be measurable on standardized testing. The speech pathologist's testimony is credible as to the explanation for low standardized test scores. The student is not given credit for appropriately written content because of poor writing mechanics. She testified, that the newly implemented programs, such as the Lindamood-Bell, "Lips Program", is a promising strategy for the child. The strategy is too recently introduced, to show results on achievement testing.

There is heavy reliance, in issuing this decision, on the testimony of both the resource room teacher and the speech pathologist, regarding the child's progress. The resource room teacher claims the child is showing measurable progress, estimating the child's current reading level is 4.5-5.0 grade level. The resource room teacher makes this conclusion based on QRI-3 test results, monitoring miscues in oral reading, and provision of more one-to-one instruction and more reading outside-of-class. The speech pathologist provides similar testimony. Improvements in writing mechanics through daily writing exercises will improve the TOWL-3 score. Phonemic awareness, which pulled down the child's language test score will improve through use of the "LIPS Program". Given time the speech pathologist expects to be able to show measurable results. The testimony of the resource room teacher and the speech pathologist reports gains the child has already made. No data was offered at the hearing to support the testimony. If the documentation does not already exist it should be produced, with sufficient detail for an objective evaluator to be able to determine the strategy, instructor, class ratio, frequency, duration and measure of progress. The measure should be presented at an IEP meeting at the end of the 2002-2003 school year in planning for the 2003-2004 school year.

While progress was slow during 2000-2001 school year, the staff has explained the child's progress since that time. The 2002-2003 IEP appears to be reasonably calculated to provide an educational benefit to the student.

The law requires children with disabilities receive their education, to the maximum extent possible, with children who are not disabled, 34 C.F.R. 300.550(b). The education must be provided in the least restrictive environment ("LRE") appropriate to meet the unique needs of the disabled child. The program as proposed appears to provide the student with a good balance of time, gaining intensive instruction in the resource room, including one-to-one instruction and an opportunity to be educated with non-disabled peers in science and social studies in mainstream science class. Furthermore, the student is able to maintain very good grades (85) eighty-five, in mainstream classes. The grades are respectable considering the student is able to function with a minimum level of support. The child demonstrates an ability to advocate for his needs, complete homework, and

benefits from recorded and written versions of text-book summaries, which are distributed to all students in the class.

The parent requests a change of placement for the student. The line of cases which provides for public school funding for education in a private school includes *Burlington v. Dept. of Educ.*, 736 Fed. 773 (1st Cir. 1984), *aff'd.*, 471 U.S. 359 (1985) and *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 359 (1985). The public school funding of the private education requires a finding that the LEA's program is not appropriate. The LEA must prove by a preponderance of the evidence that the child's program is appropriate, Regulations of Connecticut Agencies §10-76h-14. The final element of proof requires the parents prove the private placement is appropriate by a preponderance of the evidence. The parents presented no evidence to prove the program at The Learning Incentive is appropriate for the student. The child's overall lack of progress, in reading and writing from the third grade to the eighth is very troubling but changes implemented over the past two years are found to be providing the child with an educational benefit. The witnesses provided evidence that the rate of progress increased dramatically over the past two school years. The IEP and placement for the child is therefore appropriate to remediate the child's reading and writing delays. A finding that the program is appropriate precludes the necessity of reaching any conclusions as to the appropriateness of the proposed placement at The Learning Incentive.

DECISION AND ORDER:

The detailed data documenting the child's progress in the 2002-2003 school year is to be distributed in a written format, for review, at an IEP meeting to be convened at the end of the 2002-2003 school year.

The request for placement of the child is denied.