

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Avon Board of Education

Appearing on behalf of the Parent: The Parent proceeded *pro se*.

Appearing on behalf of the Board: Attorney Craig S. Meuser
Shipman & Goodwin
One American Row
Hartford, CT 06103

Appearing before: Attorney Mary Elizabeth Oppenheim
Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Whether the Board's program for the Student for the 2002-2003 school year is appropriate.
2. If not, whether the Parent's placement of the Student at Watkinson School is appropriate.¹

PROCEDURAL HISTORY:

The Parents requested this hearing on January 29, 2003. The mailing date of the decision was initially extended so that the parties could submit the matter for mediation. Further extensions of the mailing date of the decision were granted at the request of both parties, based on assertions that additional hearing dates were required for the presentation of their case. The hearing was held on four days: April 10, May 5, May 8 and May 15.

The Parent's witnesses included Jody Goeler, principal of Avon Middle School; Barbara Hartigan, Board English Teacher; David Suscovich, Psy.D.; Downey Knapp, Watkinson School Director of Learning Skills Program; and the Mother.

The Board's witnesses included Edward Leahy, Board academic support and math teacher; Christopher Butwill, Board math teacher; Barbara Hartigan, Board English

¹ An addition issue was initially presented for this hearing, but that issue was resolved by the parties. That issue was: Whether the Student is entitled to an assistive technology evaluation and a CAP-D evaluation.

teacher; Susan Del Gallo, Board occupational therapist; Susan Ledder, Board special education teacher; Laurie Ottoson, Board school psychologist; and William Hickey, Board Director of Pupil Services.

To the extent that the procedural history, summary and findings of fact actually represent conclusions of law, they should be so considered, and vice versa. *Bonnie Ann F. v. Callallen Independent School Board*, 835 F. Supp. 340 (S.D. Tex. 1993)

SUMMARY:

The Parents unilaterally placed the Student in a regular education school with an academic support class in September 2002, prior to a determination that the Student was eligible for special education and related services, without requesting a PPT, and after agreeing with a previous PPT conclusion that the Student was not eligible for special education and related services. The Parents then sought reimbursement for the private school tuition for failure to identify the Student's special education needs.

The members of the PPT agreed that the Student was eligible for special education and related services in January 2003, after the independent psychologist diagnosed the student with a neurological impairment in December 2002. The Board developed an IEP for the Student with specialized instruction, modifications and accommodations. The Parent requested this hearing to determine the appropriateness of the Board program, and whether their placement of the Student at the private regular education school is appropriate.

FINDINGS OF FACT:

1. The Student is 13 years old and in seventh grade, currently attending Watkinson School in West Hartford, Connecticut. The Parent unilaterally placed the Student in this private school in the fall 2002, and notified the Board of the placement after the school year had commenced by letter received on September 10, 2002. [Exhibit B, P-11]
2. When the Student was in fifth grade, a Planning and Placement Team ["PPT"] meeting was held to review the Student's present performance and consider a referral for special education. The team agreed to conduct an evaluation at that PPT meeting in May 2001. [Exhibit B-3]
3. During that time period, it was reported that the Student was having difficulty dealing and coping with his uncle's death. [Testimony Mother]
4. The team reviewed the evaluations at a PPT meeting in June 2001. The Student performed in the average to the high average range on the Wechsler Individual Achievement Test [WIAT]. [Exhibit B-8] On the Woodcock-Johnson Psycho-Educational Battery Revised – Test of Cognitive Ability, the Student achieved a standard score within the high average-range. The Student was administered the Slingerland Screening Test which noted a possible visual

processing concern that should be looked into further by the occupational therapist. [Exhibit B-9]

5. At the June 2001 PPT meeting, the team agreed to refer the Student to an occupational therapist for further evaluation, and determined that the Student was not eligible for special education and related services at that time. All team members agreed with the conclusions of this PPT meeting, including the Parent. [Exhibit B-10]
6. Prior to the commencement of the Student's sixth grade school year, the Principal spoke with the Mother who was concerned that the Student was to be placed in regular English, not honors English at the Board Middle School. The Principal acquiesced to the Parent's request that the Student be placed in honors English. [Testimony Mr. Goeler] At Avon Middle School, there are two tiers of English, academic and honors. Approximately 65 to 70 percent of the students at the Board middle school are placed in the academic English course. [Testimony Mr. Goeler]
7. In sixth grade, the Student met goal in the Connecticut Mastery Tests administered in the fall of the school year. [Testimony Mr. Goeler, Exhibit B-1]
8. In October 2001, the PPT met to review the evaluation completed by the occupational therapist. [Exhibit B-14] The occupational therapist concluded that the Student had areas of strength and weakness, but appears to successfully compensate for the difficulties within the school environment. [Exhibit B-13] The occupational therapist reported to the PPT that she had no concerns regarding the Student's abilities after her testing was completed. No one disagreed with her results at the PPT meeting, including the Parent. [Testimony Ms. Del Gallo] The Parent did not request an independent occupational therapist evaluation, or any other evaluations at the PPT meeting. All PPT members agreed that the Student should not be identified as eligible for special education and related services at the October 2001 meeting. [Testimony Ms. Del Gallo, Exhibit B-14]
9. The Student was referred to an academic support class at the middle school from his elementary school. The academic support class at the Avon Middle School is a program to support non-special education students in their academic classes. In the academic support class in 6th grade, the teacher worked with the Student in Math and Language Arts, on work completion, organization and study skills. The Student initially was placed in academic support every other day, and an additional flex period per day was added as the year progressed. In the academic support class, there were 4 to 5 students in the classroom with 2 teachers. [Testimony Mr. Leahy]
10. The academic support teacher did not refer the Student for special education, as the Student had the ability to grasp the concepts with individual assistance. The Connecticut Mastery Tests and the Student's grades were an indication that the Student was making progress in the regular education curriculum. Also, the academic support teacher saw the Student's progress through the Student's work on the

accelerated math software available in his classroom, as he would see the Student understood the concepts. [Testimony Mr. Leahy]

11. The Student was very creative in his English course, and was better at expressing himself in an oral presentation. The Student had difficulty with the writing in the English course. The English teacher employed a multiple intelligences approach in her classroom, teaching to the learning styles of all her students. The Student benefited from the accommodations she made in the classroom, and the way in which the teacher taught to his strengths. The English teacher did not refer the Student for special education during the sixth grade as there were no red flags that would lead her to make such a referral. [Testimony Dr. Hartigan]
12. In April 2002, the English teacher met with the Mother to share with her documentation that the Student should not be in the honors course for the next school year. The determination of placement for all students was based on the Connecticut Mastery Tests, the students' daily average, and the students' work ethic. The English teacher suggested the change for the next school year because the work gets more difficult in seventh grade. [Testimony Dr. Hartigan] This change from honors to academic level English class would not warrant a referral for special education. [Testimony Dr. Hartigan, Mr. Goeler] The Board student population is a high achieving student population, and the academic English is a rigorous class. [Testimony Dr. Hartigan]
13. The principal of the Board Middle School remembered speaking to the Parent towards the end of the school year 2001-2002 about her interest in the Student attending Watkinson School because Watkinson has lower enrollment and there was a concern regarding another student's mean-spiritedness aimed at the Student.² It's not uncommon for families to leave Avon schools to attend private schools, and he assisted the Parent by forwarding information to the private school. [Testimony Mr. Goeler]
14. The Student would have continued in academic support for the seventh grade if he had remained at Avon Middle School. He probably would have been started with every other day, and then would have seen how he progressed. Flex period would have been added if necessary. [Testimony Mr. Leahy]
15. The Board middle school uses a team approach to create a small community with the teachers from each of the different areas who discuss and are aware of the students' progress. [Testimony Mr. Goeler] The three small academic teams have 80 to 90 students per team. The team meets daily to discuss curriculum, concerns regarding students and other issues. The academic support teacher attends the team meetings to discuss students in the non-special education academic support. The Student's academic progress would have been closely monitored in this manner if he had remained at Avon Middle School in the seventh grade. [Testimony Mr. Leahy]

² The Board principal took steps to resolve the problem with the other student, including assigned bus seating, increased hall supervision, and keeping apprised of the situation with the teachers.

16. For the 2002-2003 school years, the Parents placed the Student at Watkinson School, a private school. [Testimony Mother, Ms. Knapp] Watkinson School is not a state-approved special education school, and the school has never applied to become a state-approved special education school. Watkinson School is a regular education private school with a demanding curriculum. [Testimony Ms. Knapp] Watkinson is not a special education school. [Testimony Ms. Ledder]
17. The Parents notified the school of their placement at Watkinson School on September 9, 2002, after the school year had commenced. [Testimony Dr. Hickey, Exhibit P-11] The Parents did not request a PPT meeting prior to the Watkinson placement. [Testimony Mother]
18. The Student was placed in a Learning Skills Program at Watkinson which is a curriculum support program. Learning Skills Program is not special education, just support of the curriculum. [Testimony Ms. Knapp] The Student struggled at Watkinson, and his overall performance went down in English, Science, Geography and Spanish in the second trimester of the 2002-2003 school year. [Testimony Ms. Knapp, Exhibit P-14]
19. Prior to the unilateral placement at Watkinson, the Student had been making educational progress in the Avon schools. He made progress in the Connecticut Mastery Test Scores, improving from fourth grade to sixth grade. The Parent never objected to the failure to identify the Student, and was pleased with the Student's transition to Avon Middle School. [Testimony Mother]
20. 20. Watkinson School is not providing anything that the Board middle school could provide. [Testimony Mother] The accommodations in the classroom and the Learning Skills Program provided at Watkinson are no different than what was provided for the Student at Avon Middle School. [Testimony Ms. Knapp, Mr. Leahy, Dr. Hartigan]
21. On October 9, 2002, a PPT meeting was held in response to the Parents' request that the Student be identified as eligible for special education and related services. [Exhibits P-11, B-18] At the meeting, all members of the PPT agreed that further testing would be appropriate to determine the part that the emotional component³ played in the previous testing results. [Exhibit B-18] The PPT reconvened on October 18, 2002 at the Parent's request to discuss the evaluations to be completed. [Exhibit B-21] At that PPT, all members agreed to the Parent's request that the psychological testing would be completed by an independent neuropsychologist, and that the Board would complete the speech and language evaluation and the educational testing. [Exhibit B-21]
22. The independent psychological evaluation report was completed on December 2, 2002 by David Suscovich, Psy.D. Dr. Suscovich concluded that the Student had (1)

³ This emotional component was reportedly related to the Student's loss and grieving due to his uncle's death referenced in the previous psychological testing. [Exhibit P-2, Page 14]

neurologically based deficits with visual spatial organization and short term figural memory; (2) difficulties with attention, concentration, and impulsivity secondary to his visual spatial difficulties; (3) learning disability of written expression – dysgraphia; (4) performance anxiety secondary to difficulty with visual spatial material; and (5) low self esteem. [Exhibit B-24, Testimony Dr. Suscovich] It was also indicated in the diagnosis that a central auditory processing disorder should be ruled out. [Exhibit B-24]

23. In his report, Dr. Suscovich made the following educational recommendations: (1) material should be presented in both an auditory and visual manner; (2) more complex visual spatial material should be broken down into smaller pieces and the Student should receive assistance with visual spatial organization of papers or projects; (3) the Student should have preferential seating; (4) a central auditory processing disorder evaluation should be completed; (5) if peer conflicts persist, a social skills group would be helpful; and (6) keyboarding skills should be developed better, and a laptop for taking notes could help him. [Exhibit B-24]
24. In her evaluation, the speech and language pathologist concluded that the language testing in the areas of receptive and pragmatic abilities placed the Student solidly in the average to above average range of functioning. [Exhibit B-25]
25. The Board special education teacher administered the Wechsler Individual Achievement Test – II and the Woodcock Johnson Tests of Achievement III – Standard and Extended Battery to the Student. The evaluations indicated that the Student’s written language and math skills fall within the high average to average range when compared to his grade peers. [Exhibit B-28]
26. The dates for the evaluations were extended in order to accommodate the Student’s schedule at the Parent’s request. [Testimony Ms. Ledder, Exhibit B-26]
27. The PPT convened on December 18, 2002 to review the evaluations. [Exhibit B-29] The meeting was continued to January 8, 2003 so that Dr. Suscovich could attend to present his conclusions regarding the Student. [Testimony Ms. Ledder, Exhibit B-29]
28. At the January 8, 2003 PPT, the members of the PPT agreed that the Student should be identified as eligible for special education and related services as “neurologically impaired.” [Testimony Ms. Ledder, Dr. Ottoson, Exhibit B-31] The team concluded that the Student was not eligible under the designation of Specific Learning Disability [“SLD”] as there was no significant discrepancy noted when comparing ability with achievement scores, in accordance with the tables in the Guidelines for Identifying Children with Learning Disabilities developed by the Connecticut State Department of Education. [Testimony Dr. Ottoson, Exhibits P-5, B-28, B-35] Dr. Suscovich did not disagree with the determination that the Student did not qualify as SLD. [Testimony Dr. Ottoson, Exhibit B-31] No other evaluator has concluded that the Student is neurologically impaired. [Testimony Dr. Suscovich]

29. At the PPT meeting in January 2003, the school members of the PPT proposed an Individualized Education Program [IEP] that included one period per day of special education resource assistance, is a classroom of up to six students, with a special education teacher and a paraprofessional in the classroom. The IEP provided for this specialized instruction to assist the Student's organization and written expression and noted that keyboarding skills should be assessed. The Student's program also provided for modifications and adaptations for all academic classes, including extra time for tests and projects, preferential seating, and organizational assistance with study outlines and listing of sequential steps. [Testimony Ms. Ledder, Exhibit B-31] The PPT recommendations were consistent with the recommendations in Dr. Suscovich's report of December 12, 2002.
30. In identifying the Student as Neurologically Impaired in January 2003, the Board was being proactive, as the Student had been benefiting from the regular education curriculum at the Board middle school, with the academic support class. [Testimony Ms. Ledder] Since neurologically based learning problems are more apparent as the information becomes more complex, the Board members of the PPT thought it was prudent to identify the Student at this time as eligible for special education and related services. [Testimony Ms. Ledder] The Director of Pupil Services took this more proactive approach, as the Student's needs will likely increase later, with the more complex coursework. [Testimony Dr. Hickey]

CONCLUSIONS OF LAW:

1. The Student is eligible for special education and related services as set forth in the Individuals with Disabilities Education Act, 20 U.S.C. Sec. 1401, et seq.
2. Under the federal regulations the term "child with a disability" means a child (i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services. 20 U.S.C. Sec. 1401(3), 34 C.F.R. Sec. 300.7(a)(1) The Connecticut regulations further defines "children requiring special education," as including a child who is neurologically impaired. Conn. Agencies Regs. Sec. 10-76h-14. Thus, the Student is identified as eligible under the state regulations as "neurologically impaired," which would reasonably be placed under the category of other health impairments in the federal regulations.
3. The Board has the burden of proving the appropriateness of the Student's program and placement, which burden shall be met by a preponderance of the evidence. Conn. Agencies Regs. Sec.10-76h-14. The Board has met its burden in this case.
4. The standard for determining whether a Board has provided a free appropriate public education is set forth as a two-part inquiry in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). It must first be

determined whether the Board complied with the procedural requirements of the Act. The second inquiry is a determination of whether the Individualized Educational Program is “reasonably calculated to enable the child to receive educational benefits.” 458 U.S. at 206-207.

5. As to the first inquiry, nothing in the record supports any claim for a violation of the Parents’ procedural rights. Therefore, the Board complied with the procedural requirements of the Act.
6. The second inquiry is the determination of whether the IEP is reasonably calculated to enable the child to receive educational benefits. The Individuals with Disabilities Education Act (IDEA) does not itself articulate any specific level of educational benefits that must be provided through an IEP. The Supreme Court, however, has specifically rejected the contention that the “appropriate education” mandated by IDEA requires states to “maximize the potential of handicapped children.” *Walczak v. Florida Union Free School District*, 27 IDELR 1135 (2d Cir. 1998), citing *Rowley*, supra. An appropriate public education under IDEA is one that is likely to produce progress, not regression. *Id.* The goal of IDEA is not to maximize a special education child’s potential, but rather to provide access to public education for such children. *K.P. v. Juzwic*, 891 F. Supp. 703, 718 (D.Conn. 1995).
7. The appropriate standard is whether the Student can derive meaningful educational benefit from the proposed program, not everything that might be thought desirable by loving parents. *Tucker v. Bay Shore Union Free School District*, 873 F. 2d 563, 567 (2d Cir. 1989) The Board’s proposed program, based on the Student’s evaluations, is carefully drafted so that the Student can derive such meaningful educational benefit.
8. In addition to the free appropriate public education requirement, IDEA’s preference is for disabled children to be educated in the least restrictive environment capable of meeting their needs. *Walczak*, supra. IDEA sets forth a strong congressional preference for integrating children with disabilities in the regular classrooms. *Oberti v. Board of Education*, 995 F. 2d 1204 (3d Cir. 1993) School districts must evaluate whether a child with a disability can be educated in a regular classroom if provided with supplementary aids and services. *Oberti*, 995 F.2d at 1216, *Mavis v. Sobol*, 839 F. Supp. 968, 985-986. The Act’s least restrictive environment requirement is met when the child with a disability is educated in the regular classroom, or when the child who cannot be fully included is mainstreamed to the “maximum extent possible.” *Oberti*, 995 F. 2d at 1217 The Student can be educated in the regular classroom, and the Board’s IEP of January 8, 2003 provides for a program for the Student will be educated in the regular classroom to the maximum extent possible.
9. The program proposed by the Board is appropriate for the Student, considers his strengths and weaknesses, is developed so that the Student can derive meaningful educational benefit, and will be delivered in the least restrictive environment. The Student’s program was individually designed after careful review of all evaluations, to place the Student in regular classes with resource room assistance, and with

appropriate modifications and accommodations. The Board took reasonable steps to evaluate the Student, and accommodate the Parent's requests as to the evaluator and the schedule for the evaluations. Nothing in the record supports the conclusion that the Student should have been identified as eligible for special education and related services prior to the January 8, 2003 PPT meeting. Rather, the record supports that the Board was proactive in identifying the Student as eligible for special education and related services, and the eligibility is only appropriate now as the curriculum becomes more complex.

10. As the Board's program is appropriate, it is not necessary to determine the appropriateness of Parent's proposed placement. See, *Burlington School Committee v. Dept. of Ed.*, 471 U.S. 359 (1985), *Florence Co. School District v. Carter*, 114 S.Ct. 361 (1993) (Reimbursement for private school placement is only awarded when the district's program was not appropriate and that the private placement could provide an appropriate educational program for the child).

FINAL DECISION AND ORDER:

The Board's program for the Student for the 2002-2003 school year is appropriate. As the Board's program is appropriate it is not necessary to determine the appropriateness of the Parent's proposed placement.