

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. Hartford Board of Education

On behalf of the Parents:

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On behalf of the Board of Education:

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Appearing before:

Stacy M. Owens, Esq.
Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Whether the Board provided the Student a free appropriate public education during the 2003-2004 school year.
 - a. If not, whether the Intensive Education Academy (IEA) is an appropriate placement and program for the Student; and
2. Whether the Student is entitled to compensatory education for the 2002-2003 school year for math lessons.

SUMMARY

The Parents claim they were concerned about the implementation of the Student's 8th grade program. The Board denied their request for an independent monitor of the program and additional services that were provided by the Student's previous special education teacher. As a result of their concerns, the Parents unilaterally placed the Student in a segregated private school and seek reimbursement.

The Board contends the program offered to the Student for her 8th grade year is appropriate.

PROCEDURAL HISTORY

On April 22, 2004, the State of Connecticut Department of Education received a request for hearing from the Parents' Attorney, Sally Zanger. On the same day, the undersigned was appointed as hearing officer to preside over the hearing, rule on all motions, determine findings of fact and conclusions of law and issue an order.

A prehearing conference between the Hearing Officer and the attorneys convened on April 30, 2004. The hearing in this matter took place on June 2, June 4, June 7, June 16, July 12 and July 19, 2004.

Briefs were submitted/postmarked on August 30, 2004, and reply briefs were submitted/postmarked on September 10, 2004.

FINDINGS OF FACT

1. The Student is 15 years old. She has Down Syndrome and is eligible to receive special education services within the Board's district. (Tr. 6/2/04, p. 34; Tr. 7/12/04, p. 59; B-2, B-7, B-12)
2. During the 2001-2002 school year, the Student was in 5th grade and attending school at the Kennelly School.
3. On February 13, 2001, during the Student's 5th grade year, the Parents and the Board entered into a Mediated Agreement outlining an inclusive educational program for the Student. (B-1)
4. The Mediated Agreement was incorporated into the Student's IEP for her 2001-2002 educational program. The Mediated Agreement provided the Student a paraprofessional to provide one-to-one assistance to the Student throughout her school day; 15 hours per week of special education services; plus an additional 1.5 hours per week of speech and language services. The special education teacher was expected to supervise the paraprofessional, review and modify the mainstream classroom assignments and curriculum to meet the Student's level of understanding and progress as well as provide the Student instruction. (Tr. 6/16/04, pp. 33-34; B-1)
5. The terms of the Mediated Agreement continued to be implemented by the Board through the Student's 5th, 6th, and 7th grade years at the Kennelly School. (Tr. 6/2/04 pp. 127, 169; Tr. 6/7/04 pp. 193, 194; B-3, B-5, B-7)
6. Once students at the Kennelly School enter the 7th grade they are considered to be in middle school and are provided a rotating classroom schedule in which they

- move from classroom to classroom to receive their various academic and special instruction. (Tr. 6/16/04, p. 6-7)
7. The delivery of instruction in accordance with the terms of the Mediated Agreement for the Student were modified from 5th grade through 7th grade so the Student could receive her special education instruction in coordination with the general curriculum. (Tr. 6/16/04, pp. 6-7)
 8. One of the modifications was that in 5th grade, the Kennelly School curriculum provided a “writing” period each day. However, in 7th grade writing instruction is incorporated into the academic classes. “Writing” is not a separate course in 7th grade. Thus, the Student was provided “writing” instruction as a part of her academic coursework. (Tr. 6/16/04, pp. 7-9; 7/19/04, p. 53; B-5)
 9. With the exception of math, the Student participated in regular education classes for all of her academic subjects in 7th grade. The Student’s math instruction was provided in the resource room by Ms. Creamer. (Tr. 6/16/04, pp. 25-26)
 10. Diana Creamer was the Student’s special education teacher from 5th grade through 7th grade. Ms. Creamer provided support to the Student each day in a few of her regular academic classes. The support Ms. Creamer provided to the Student within those classes, and the time she took to modify or revise the curriculum to meet the Student’s academic level, fell within the 15 hours of special education instruction prescribed in the Mediated Agreement and the Student’s IEP. (Tr. 6/16/04, pp. 25, 26)
 11. In addition to the 15 hours of special education instruction Ms. Creamer provided the Student per week, Ms. Creamer took additional time, outside the scope of the Mediated Agreement and IEP to modify or adjust the mainstream curriculum for classes Ms. Creamer did not attend, so the Student could follow the regular classroom instruction at her own academic level. Ms. Creamer remained present in the school throughout the day even though her schedule demanded less of her time. Thus, she was able to provide services beyond the parameters of the Mediated Agreement and the Student’s IEP. (Tr. 6/16/04, pp. 33-39)
 12. The Student’s IEP for 7th grade provides that the Student was to receive 7.5 hours per week of special education services within the resource room or a segregated setting. (Tr. 7/19/04 pp. 9-11; B-5).
 13. Ms. Creamer provided the Student instruction within the resource room to focus on her math. (Tr. 6/16/04, pp 67-72)
 14. During the Student’s 5th and 6th grade years, the Student received math instruction in the resource room with other students that were being instructed in math. However, in 7th grade, the Student received math instruction in the resource room while other students were being instructed in reading. (Tr. 6/17/04, pp. 67-72)

15. It is not uncommon for a student being educated within a resource room to be instructed in a different subject or at a different level than other students receiving services in the resource room. The Student continued to progress in math under the direction of Ms. Creamer. (Tr. 6/16/04, p. 73; Tr. 7/12/04, pp. 42, 43; Tr. 7/19/04, pp. 10, 11, 50, 51, 89, B-7).
16. The Parents disapproved of the Student receiving instruction in the resource room with other students being instructed in reading. Although the Father expressed his contention with the resource room arrangement, the Parents failed to make their contentions known at a PPT meeting. (Tr. 6/16/04, pp. 15-16; B-3, B-4, B-5).
17. After learning of the Parent's lack of acceptance of the resource room arrangement, Assistant Principal, Michael Emmett, changed the resource room arrangement, so as to provide the Student math instruction in the resource room with other students instructed in math. (Tr. 7/19/04, p. 9)
18. On June 16, 2003, the PPT met to devise the Student's IEP for her 8th grade year. The Parents were informed that Ms. Creamer likely would not be returning to the Kennelly School and that the special education teacher assigned to the Student would be working at the Kennelly School on a part-time basis. (Tr. 6/2/04, pp. 143-144; B-6, B-7)
19. Ms. Creamer's transfer to another school in the district was the outcome of a union grievance that concluded during the summer of 2003. Ms. Creamer was considered a full-time teacher, however, the budget at the Kennelly School for the 2003/2004 school year only provided for a part-time position. Although Ms. Creamer was assigned to work at the Kennelly School in her "full-time" capacity during the 2002/2003 school year, Ms. Creamer's responsibilities at the Kennelly School constituted "part-time" in that she was only required to work with the Student for 15 hours per week and one other student a few hours per week. (Tr. 6/2/04, pp. 143-144; Tr. 7/19/04 pp. 111-112; B-6, B-7, B-12).
20. Upon Ms. Creamer's departure from the Kennelly School, the Board, through Attorney Bird, offered to transfer the Student to the Learning Corridor to continue to receive instruction from Ms. Creamer. The Parents rejected this suggestion and wanted the Student to remain in her home school. (Tr. 6/2/04, pp. 87-88; Tr. 6/7/04, pp. 149-150).
21. The core terms of the Mediated Agreement can continue to be satisfied at Kennelly, and the Student's educational program could be delivered by a special education teacher other than Ms. Creamer. (B-1)
22. Michelle Bonfiglio, a state certified special education teacher, was hired as a part-time teacher to provide the Student special education instruction during her 8th grade year. Ms. Bonfiglio was hired as a recent college graduate with a 4.0 grade

- point average, two student internships and over thirty hours of classroom experience. While student teaching, Ms. Bonfiglio delivered special education services in inclusion and resource room settings. (Tr. 7/12/04, pp. 71-73, 196)
23. Ms. Bonfiglio was charged with providing special education services to the Student in conformance with the Mediated Agreement and the Student's IEP for the 2003-2004 school year. (Tr. 7/12/04, p. 87; *See FF # 4 above*)
24. In preparation for providing services to the Student, Ms. Bonfiglio reviewed the Student's IEP, researched Down Syndrome and structured the Student's coursework based on the 8th grade curriculum. Sonya Kunkel, an expert in inclusion practices, was hired by the Board to exclusively assist Ms. Bonfiglio and provide her on-call support subsequent to her training. Ms. Kunkel provided direct assistance to Ms. Bonfiglio on two separate occasions, and helped her develop a parallel curriculum and inclusive strategies. (Tr. 6/7/04, pp. 29-38; Tr. 7/12/04, pp. 70-75; B-10, B-13)
25. On August 27, 2003, Ms. Bonfiglio, along with Assistant Principal Michael Emmett and Special Education Coordinator Mary Anne Sullivan, met with the Parents to discuss the Student 8th grade program. At such meeting, the Father expressed his displeasure of the assignment of a new special education teacher with Ms. Bonfiglio's level of experience for the Student and his intent to pursue due process. (Tr. 6/7/04, p. 150; Tr. 7/12/04, pp. 76-77)
26. The Student did not attend her first day of school on September 2, 2003. (Tr. 7/12/04; p. 79; B-16)
27. When Ms. Bonfiglio began to provide instruction to the Student, she commenced with lessons the Student had already learned or were beyond her level of achievement. Ms. Bonfiglio failed to adequately modify the curriculum to the Student's level of understanding. Thus, the Student's progress was delayed until the Father informed Ms. Bonfiglio that the Student was already taught the information or the assignment was too advanced for the Student's stage of learning. (Tr. 7/12/04, p. 117, B-18, B-20)
28. In review of Ms. Bonfiglio's assignments for the Student, Ms. Creamer testified that she would have modified the curriculum differently. For example, Ms. Creamer explained that:
- (1) For adding money, she would have used the same worksheet that Ms. Bonfiglio used but would have also had the Parents use actual coins and take out the fifty cent pieces; and
 - (2) In math, the Student was beyond single digit addition at the time she left Kennelly. Ms. Creamer stated the Student was doing double digits in the 7th grade. (B-18, B-20)

Upon her departure from the Kennelly School, Ms. Creamer met with Ms. Bonfiglio, gave her some books and materials, and they spoke for approximately two to three hours about the Student and the philosophy of inclusion. Ms. Creamer called Ms. Bonfiglio after she left the Kennelly School and left a message for Ms. Bonfiglio to see if she needed any help with the Student. Ms. Bonfiglio never called Ms. Creamer back. (Tr. 6/16/04, DC)

Considering Ms. Bonfiglio's unfamiliarity with the Student, the school and the curriculum as a new hire, redundant or out-of-level teaching could have been eradicated had Ms. Bonfiglio taken the initiative to more actively consult with the Student's previous special education teacher, Ms. Creamer. (Tr. 6/16/04, DC; B-17, B-18, B-20, B-21)

29. Ms. Creamer had first-hand experience teaching the Student, and as testified by the Parent, was successful in helping the Student progress. Thus, from Ms. Creamer, Ms. Bonfiglio could have acquired valuable information relating to the Student's present level of understanding, successful teaching strategies, and lessons the Student has already learned without unnecessarily backtracking. (Tr. 6/16/04, DC)
30. On September 12, 2004, the Parents visited the Intensive Education Academy (IEA) and during the September 15, 2003, PPT meeting requested the Student be placed at IEA at the Board's expense. The Board denied the Parents' request. (B-10)
31. On November 3, 2003, the Student began school at IEA. (Tr. 7/12/04, p. 59)
32. The Student's program at the Kennelly School was inclusive, providing for mainstream opportunities in academics and extra-curricular activities. The Student was educated and socialized with non-disabled peers. She participated in the band, went on field trips, and attended the school dance. (Tr. 6/16/04, DC)
33. IEA offers an educational program exclusively for disabled students. The IEA program is a functional-based curriculum with no opportunities for inclusion in a mainstream setting. (Tr. 6/7/04, pp. 23-24, 166; P-38 - P-42)
34. As defined by Jody Lefkowitz, the Board's Director of Special Education, functional education is the teaching of "academic skills tied to activities of daily living." The Board has the ability to provide the Student a more functional educational program. (Tr. 7/1/04, p. 127)
35. While the Student was attending the Kennelly School, the Parents requested the Student be educated in an inclusive setting. The Mediated Agreement outlines an inclusive educational program. The Parents never requested a more functional-based educational program or self-contained placement for the Student, like that offered at IEA. (B-1, B-3 – B-7, B-10)

36. The program offered to the Student in her June 16, 2003, IEP for her 8th grade year at Kennelly is appropriate to meet her special needs in a less restrictive environment. However, the delivery of such program requires more skillful adjustment. Ms. Bonfiglio underutilized the expertise of Ms. Kunkel and the experience of Ms. Creamer. Furthermore, as a new hire with minimal experience, the Board failed to provide Ms. Bonfiglio with adequate staff support or monitoring of her implementation of the Student's program. (Tr. 7/7/04, pp. 81-86; 7/19/04, pp. 24, 46, 61-64, 94-98, 121-158; B-7, B-16 – B-20)
37. Ms. Bonfiglio demonstrates the ability to access information, modify her instruction as needed, and accordingly apply her special education background to her responsibilities. With proper guidance and supervision, Ms. Bonfiglio is capable of adjusting and providing the Student an appropriate educational program as outlined in her IEP; or in the alternative, a more functional-based educational program at the Kennelly School that offers more mainstream opportunities. (Tr. 7/12/04, pp. 43, 48, 94, 113)

CONCLUSIONS OF LAW

The Individuals with Disabilities Education Act ("IDEA") mandates all school districts to provide students a free appropriate public education ("FAPE"). FAPE is defined as:

Special education and related services that (a) have been provided at public expense, under public supervision and direction and without charge; (b) meet the standards of the State educational agency; (c) include an appropriate preschool, elementary, or secondary school education in the State involved; and (d) are provided in conformity with the individualized education program (IEP) under [this Act]. 20 U.S.C. §1401(8).

The Supreme Court in the case of *Hendrick Hudson Board of Education v. Rowley* established a two-tier review to determine whether a student's education is "appropriate." The first tier of review is to analyze procedural compliance with the IDEA by the Board. The second tier of review is to analyze whether the IEP developed for the student is reasonably calculated to enable the child to receive educational benefit. *Hendrick Hudson Board of Education v. Rowley*, 458 U.S. 176 (1982).

Though the Parents' attorney alleged procedural violations during preliminary discussions on the first day of hearing, such assertions were not alleged in the Parents' request for hearing, nor during the prehearing conference. The Parents' last minute effort to add a claim of procedural violations unjustly prejudiced the Board by providing

insufficient notice of the claims against it. As such, procedural compliance by the Board is not an issue for review in this matter. However, the sufficiency of the IEP developed for the Student's 2003-2004 school year is under scrutiny to determine whether the PPT devised a program that provides the Student a free appropriate public education.

In this particular case, the Parents have unilaterally placed the Student at IEA, a segregated private school, and seek reimbursement from the Board. Prevailing case law provides that parents can unilaterally place a child in an appropriate private school program at the district's expense, as long as it is first determined that the program offered by the district is not appropriate. *Burlington v. Dept. of Education*, 471 U.S. 359 (1985); *Florence County School District v. Carter*, 114 S.Ct. 361 (1993).

Section 10-76h-14 of the Regulations of Connecticut State Agencies provides that the Board has the burden of proving by a preponderance of the evidence that the Student's educational program and placement is appropriate.

In this particular case, the Student's IEP for the 2003-2004 school year, in part, was generated from the Mediated Agreement the parties entered into in February of 2001. Any minor deviation from the Mediated Agreement has been a reflection of the change in the school's curriculum from grade to grade and the Student's progress. The Parents in this case claim that the Board failed to develop the Student's 2003-2004 IEP in accordance with the February 2001 Mediated Agreement, effectively denying the Student a free appropriate public education.

According to the court in *Mrs. J., et al v. Board of Education, et al*, as long as a settlement agreement is entered into voluntarily and willingly, it is enforceable and hearing officers have the authority to enforce the terms of a voluntary settlement agreement. *Mrs. J., et al v. Board of Education, et al*, 98 F. Supp. 2d 226 (D.Conn. 2000). In review of the Student's 2003-2004 IEP, the undersigned finds that the program offered through the IEP fully complies with the Mediated Agreement.

The Parents bore no contentions with the Student's 2002-2003 IEP in which the terms of the Mediated Agreement were engrafted into the framework of the Student's educational program. Similarly, the Student's 2003-2004 IEP adopted the fundamental terms of the Mediated Agreement with adjustments to accommodate changes in the Student's progress and the school's curriculum. The one major change in the Student's

educational program was the result of factors completely beyond the control of the Board, that being the departure of Diana Creamer, the Student's special education teacher, from the Kennelly School. Despite Ms. Creamer's departure, the Board offered the Student a program in compliance with the Mediated Agreement, with special education services rendered by a different special education teacher, Michelle Bonfiglio. Essentially, the Student was offered the exact same educational program with Ms. Bonfiglio that she was offered with Ms. Creamer.

The Parents expressed satisfaction with the Student's progress and the programs for her 6th, 7th and 8th grade years, but it is apparent that their dissatisfaction did not surface until it was evident that Ms. Creamer was not returning to the Kennelly School. Prior to the commencement of the 2003-2004 school year, but after discovery of Ms. Creamer's departure from the program, the Parents suddenly voiced concerns that the Student's 8th grade program was inadequate. The Father expressed his intention to file for due process at the August 27, 2003, meeting with Ms. Bonfiglio, Mr. Emmett and Ms. Sullivan, and by November 2003, the Student was enrolled in IEA.

What cannot go unnoted is the fact that "on paper" the program offered to the Student has been consistently in line with the terms of the Mediated Agreement since February 2001, but Ms. Creamer, of her own initiative, provided services beyond the scope of the Mediated Agreement and the Student's IEPs. Thus, the Parents appear to have agreed to the IEPs for the 6th, 7th and 8th grade years, with the unwritten expectation that the Student's special education teacher would do just as Ms. Creamer did and remain in the school all day to provide pull-out and other services beyond the 15 hours of special education services outlined in the Mediated Agreement or IEP. Instead, Ms. Bonfiglio, as the newly hired special education teacher, was expected by the Board to strictly adhere to the services outlined in the IEP.

To ensure a child receives a free and appropriate public education in accordance with the IDEA, the student's educational program should be "reasonably calculated to enable the child to receive educational benefit." *Rowley* at 3051. Educational benefit is measured as the basic floor of opportunity, not a program maximizing a child's educational potential. *Id.* In this instance, the services prescribed in the IEP and the Mediated Agreement amount to an educational program "reasonably calculated to enable

[the Student] to receive educational benefit.” However, coupled with the additional services provided by Ms. Creamer, the Student was receiving an educational program that qualified as “maximizing” her educational potential. As to be expected, the Parents preferred the services of Ms. Creamer, but the threshold for determining the appropriateness of a program is not what is considered more desirable by the parents, but again, whether the Student can derive meaningful educational benefit. *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

Ms. Bonfiglio was hired by the Board to work part-time, therefore, unlike Ms. Creamer, she did not remain in the school all day to provide additional services. The Mediated Agreement prescribes 15 hours of special education services and an additional 1.5 hours of speech and language. The special education teacher is expected to supervise the paraprofessional, review and modify the mainstream classroom assignments and curriculum to meet the Student’s level of understanding and progress, as well as, provide the Student instruction. Ms. Bonfiglio was hired by the Board to work solely with the Student. She had no other students assigned to her, making it possible for her to comply with the terms of the Mediated Agreement and the Student’s IEP within a part-time workday. As for the Parents’ preference that the Student’s special education teacher be present in the school all day, in accordance with the Mediated Agreement, Angie Capp, the paraprofessional, was assigned to work with the Student one-to-one throughout the school day to address any concerns that could arise in the special education teacher’s absence.

Mainstreaming is another major component to determine the appropriateness of a child’s educational program. Students are required to be educated in the least restrictive environment in which their special needs can be met. *Walczak v. Florida Union Free School District*, 27 IDELR 1135 (2d Cir. 1998). This requirement is fulfilled when the child is educated in a regular classroom with supplementary aids and services, or mainstreamed to the “maximum extent possible.” *Oberti v. Board of Education*, 995 F.2d 1204, 1216, 1217 (3d Cir. 1993). The program offered by the Board sufficiently provides the Student a program allowing her to be educated with non-disabled peers. Unlike IEA, the Board has focused its efforts on educating the Student in an inclusive

setting, allowing her to benefit from social development uniquely strengthened through her interactions with non-disabled peers.

The Board's program, as consistently approved by the Parents since February 2001, has allowed the Student to successfully achieve her goals and objectives. The Student has demonstrated progress as a result of her program at the Kennelly School. Remembering this is not a determination as to whether the program at IEA is better than the program offered by the Board, but instead whether the Board's program provides the Student FAPE, the Board's program as outlined in her June 2003, IEP, is deemed appropriate to meet the special needs of the Student. Therefore, a review of the program at IEA is not necessary.

It is recognized, however, that the Parents' concerns cannot be invalidated entirely. The program, as prescribed in the IEP is appropriate, but the program as rendered by Ms. Bonfiglio, falls short. This shortfall in instruction can be rectified by providing Ms. Bonfiglio more supervision, monitoring and training. Ms. Bonfiglio is fully qualified and capable of serving the special needs of the Student. Irrespective of her experience, Ms. Bonfiglio reasonably needs time to develop familiarity with the Student, as would any teacher working with a new student. The assignment of a new teacher was a transition for both the Student and Ms. Bonfiglio. Considering the Parents' swift transfer of the Student to IEA, neither the Student or Ms. Bonfiglio were given the opportunity to overcome the transitional curve.

FINAL DECISION AND ORDER

1. The program outlined in the Student's June 16, 2003 IEP for the 2003-2004 school year provides the Student a free appropriate public education and adequately incorporates the terms of the Mediated Agreement. Thus, it is not necessary to consider the appropriateness of the program offered at IEA.
2. The Board must provide additional support to the Student's special education teacher to ensure the Student's instruction is appropriately delivered in accordance with the IEP and Mediated Agreement in place for her educational services. The Board is ordered to:
 - a. Develop a schedule for weekly supervisory consultations with the Student's special education teacher to discuss the Student's lesson plan and teaching strategies;

- b. Conduct random supervisory monitoring of the special education teacher's instruction on a weekly basis;
 - c. Maintain a log of the monitor's observations to discuss and address issues during consultations; and,
 - d. Provide additional training opportunities for the special education teacher focused on Down Syndrome and inclusion practices.
3. The Student is not entitled to compensatory education for math lessons during the 2002-2003 school year.