

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Waterford Board of Education v. Student

Appearing on behalf of the Board: Attorney Lawrence J. Campana
Sullivan, Schoen, Campana & Connon, LLC
646 Prospect Avenue
Hartford, CT 06105-4286

Appearing on behalf of the Parent: The Parent was *pro se*¹

Appearing before: Attorney Mary Elizabeth Oppenheim
Hearing Officer

FINAL DECISION AND ORDER

ISSUE:

Whether the Board is entitled to conduct an evaluation of the Student in the absence of parental consent.

PROCEDURAL HISTORY:

The Board requested this hearing on December 9, 2004. A prehearing conference was held on December 15. The Parent was not present for the first prehearing, and no request for rescheduling of the prehearing was received from the Parent. In addition, the notice of the prehearing was sent via first class mail, and was not returned as undeliverable. The Board principal confirmed on the record at the hearing that the Parent's address was accurate in their records, and that the Board was able to communicate with the Parent at that address. The prehearing conference proceeded with the Board's attorney only in accordance with Conn. Regs. Agencies Sec. 10-76h-7(c) which provides that if a party fails to participate in a prehearing conference, the hearing officer may proceed with the conference.

As a courtesy to the Parent, an additional prehearing conference was held on December 20. Despite the notice of the prehearing, the Parent was not present for this second prehearing conference.

Notice of the scheduled hearing date was forwarded to the parties, and the hearing convened in accordance with the notice of hearing on January 20. The Parent did not appear at the hearing on January 20, and the Board attorney was directed by the hearing officer to contact the Parent to determine whether she intended to appear at the hearing.

¹ The Parent failed to appear at the duly noticed hearing.

After a short break, the Board's attorney returned to the hearing room, and reported that there was no answer at the Parent's phone number, and he had left a message at her home phone number. After a break to ensure that the Parent was not merely delayed in her appearance at the hearing, the Board proceeded with its case.

The Board's witnesses were Sue Rosenfield, Board director of special education and Craig Powers, principal of the Board's Great Neck Elementary School.

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 Student is a fifth grader who has experienced behavioral difficulties and declining academic performance since he was enrolled in the Board schools in the fall 2002. Teachers have consistently noted that the Student is disconnected from peers and unable to maintain appropriate physical boundaries. The Student has a lack of focus and attention, and an inability to maintain self control. The Board has asserted that these behaviors have impaired the Student's educational performance, and the Student has been unable to demonstrate academic achievement, particularly in light of his high intellectual ability. The Board has requested that the Student undergo a comprehensive evaluation to determine whether he is eligible for special education and related services. The Parent has failed to consent to the Board's evaluation. The Board has brought this hearing request to override the Parent's lack of consent to the evaluation.

FINDINGS OF FACT:

1. The Student is 9 years old and enrolled in fifth grade at the Board elementary school. [Exhibit B-3, Testimony Ms. Rosenfield]
2. The Parent enrolled the Student in second grade at the Board school in August 2002. Prior to that, the Parent had home schooled the Student. The Parent had informed the Board that the Student had a bad experience in kindergarten at another school. [Testimony Ms. Rosenfield, Mr. Powers]
3. Early in the Student's second grade year, the Parent told the Board that she thought the Student wasn't being challenged in school. This resulted in a number of Student Teacher Assistance Team [STAT] meetings being convened at the school to discuss the Parent's concerns. [Testimony Ms. Rosenfield, Mr. Powers]
4. At this same time, the Student was having behavioral issues in the classroom, including being extremely disruptive and taunting other children. [Testimony Ms. Rosenfield] The Student was very noncompliant with teacher requests to pay attention, and to keep his hands off of other children. The Student also left the classroom without permission. [Testimony Mr. Powers]

5. As a result of a STAT meeting held in October 2002, the team decided to assess the Student to determine if he was placed in the correct grade level to effectively challenge him. [Testimony Ms. Rosenfield, Exhibits B-12 and B-13] The basic skills coordinator administered assessments to determine placement. [Testimony Ms. Rosenfield, Exhibit B-13]
6. At the subsequent STAT meeting on 11/7/02, the team determined that placing the Student into a third grade placement would be the most sensible decision. The Student was transitioned on the date of the STAT meeting. [Exhibit B-18]
7. In response to the behavioral concerns, the Board social worker conducted an observation of the Student. The Parent did not consent to a social worker interview of the Student. [Testimony Ms. Rosenfield, Exhibit B-16]
8. The social worker observation noted that the Student was disconnected from his peers, but the social worker could form no other impressions on possible causes for this disconnection as the social worker did not have an opportunity to interview the Student. [Exhibit B-16]
9. Following review of the placement assessment completed by the basic skills coordinator, a request was made to have the Student undergo a cognitive assessment to help with decisions regarding future educational planning for the Student. The assessment solely consisted of the administration of the WISC-III. The results indicated that the Student's general cognitive ability is within the very superior range of intellectual functioning, with a verbal score of 127 (Superior), a performance score of 139 (Very Superior) and a Full Scale Score of 135 (Very Superior). Based on these results, the school psychologist recommended that the Student be considered for the Talented and Gifted [TAG] program. [Exhibit B-23]
10. In the cognitive assessment, the school psychologist commented on the Student's continued behavioral concerns, noting that "it would be important to get a better handle on [the Student's] social-emotional functioning to help identify and consequently intervene in areas that may be interfering with [the Student's] academic success." The school psychologist further opined that "[i]f [the Student] is preoccupied with his thoughts and feelings and/or feels socially isolated, this would most certainly have a negative impact on his learning." She suggested that the Student be interviewed by the school social worker or school psychologist with parental permission to determine if he would benefit from school counseling support. [Exhibit B-23] The Parent did not agree to this interview. [Testimony Ms. Rosenfield]
11. The behavioral issues continued throughout the 2002-2003 school year when the Student was in third grade. [Testimony Ms. Rosenfield] The Student was not just chewing on pencils, he was eating them. He ate crayons. Many times he was

- very physical with other kids. The teachers tried to cue the student to have the Student pay attention and perform academically, which worked with little success. When the Parent was contacted about these issues, the Parent would indicate that she thought it would take the Student one year to transition to the public school. The principal spoke with the Parent to recommend that school counseling be considered to help to intervene with the behaviors. The Parent was vehemently opposed to counseling. [Testimony Mr. Powers]
12. The Student's final progress report in third grade noted that the Student is "still unable to maintain self control and this affects his social behavior and academic performance." [Exhibit B-33]
 13. In the 2003-2004 school year, the Student advanced into fourth grade. [Testimony Ms. Rosenfield, Mr. Powers]
 14. The frequency of the behavior problems increased during fourth grade. While the Student had a very experienced teacher, the teacher had to spend an inordinate amount of time keeping the Student focused. [Testimony Mr. Powers]
 15. On October 15, 2003, the Student was suspended as a result of improper physical contact with other students. [Exhibit B-37] Less than a week later, the Student vandalized the boy's bathroom, and received an in-school consequence for that action. [Exhibit B-38] In November 2003, the Student received another in-school consequence for soaping up the bathroom mirrors. [Exhibit B-39]
 16. In the Student's first progress report in fourth grade, it was recommended that the Student must make an effort to behave appropriately in the classroom. Each teacher's report of his progress at that time noted problems with impulsivity and inappropriate behavior. [Exhibit B-42]
 17. On December 12, 2003, the Student received a one day suspension for physical assault on another person for kicking and punching on the playground. [Exhibit B-43]
 18. On December 23, 2003, the Board sent out a Notice of Planning and Placement Team [PPT] Meeting to the Parent. The purpose of the PPT scheduled for January 9, 2004 was to discuss a referral to special education and consider/plan for an evaluation. [Exhibit B-45]
 19. On January 9, 2004, the PPT convened, and the team recommended that the Student undergo a comprehensive evaluation including an ecological evaluation, educational assessment, language evaluation and occupational therapy observation. [Testimony Ms. Rosenfield, Exhibit B-46] The Parent signed consent for the evaluation, but subsequently, on January 12 revoked her consent to evaluate the Student. [Exhibits B-47, B-49]

20. By early February, a regular aide was assigned to the Student's classroom to deal with the Student's behavioral issues. While there was some benefit to having two adults in the classroom, the interruptions caused by the Student continued. The Student continued to be difficult, was insubordinate with the aide at times and continued to be noncompliant with requests. [Testimony Mr. Powers]
21. During the fourth grade school year, the Student's negative behaviors blossomed in the unstructured time of passing in the hallways, during recess and in the cafeteria. The Student would continue to provoke other children who might have been perceived as having weaknesses, and he continued inappropriate touching on boys and girls. The Parent was contacted regarding the Student's behaviors, and responded that boys will be boys. The Parent indicated that touching is a human response, a normal behavior. The Parent would characterize the touching in that the Student wants to connect with people; the Board principal would note that the touching was inappropriate. [Testimony Mr. Powers]
22. The Student continued to be disconnected from his peers in fourth grade, and did not have friends. He would be argumentative with adults, and then sometimes would become compliant and accept the consequence related to his behavior. [Testimony Mr. Powers]
23. During fourth grade, the Board attempted to institute a behavioral plan, and the Parent strongly objected to that. Therefore, the Board did not commence a behavioral plan that year. [Testimony Mr. Powers]
24. On February 11, the Board sent the Parent notice of its intent to file a request for due process, indicating that the request would be filed on February 20. The Board also indicated that it was interested in mediating the dispute, and forwarded the form to request mediation by the state Department of Education to the Parent. [Exhibit B-54]
25. The Parent agreed to submit the matter for mediation, and the mediation session was scheduled for March 10. [Exhibits B-58, B-61]
26. On March 23, 2004, the Board filed its initial request for due process regarding the Parent's revocation of the consent to evaluate the Student. [Exhibit B-70] This was in follow-up to the mediation session held on March 10, in which the parties were unable to resolve this dispute. [Exhibit B-71]
27. At that time, the Board felt that the evaluation must be completed due to the Student's behaviors and social difficulties, coupled with his academic difficulties. The Student was unable to demonstrate the kind of academic expectations given his high ability. He was unable to produce the simplest work at that time. He had difficulty with focus and attention, and had difficulty maintaining boundaries. [Testimony Ms. Rosenfield]

28. In the second marking period of the Student's fourth grade year, it was noted that the Student's impulsivity continued to be a problem in the classes. The teachers noted that the Student's behavior is inappropriate, and he requires many reminders to behave appropriately. [Exhibit B-69]
29. On March 31, the Board received a request for the Student's records from the Child Development Center of Connecticut Children's Medical Center [CCMC], as well as a request for an observation by a licensed psychologist. [Testimony Ms. Rosenfield, Exhibit B-79]
30. At this time, the Board also received a school questionnaire which was filled out by the Student's classroom teachers for the CCMC evaluation. This questionnaire included rating scales to be completed by the teachers. [Testimony Ms. Rosenfield, Exhibit B-81]
31. The PPT convened on June 10, 2004. At that PPT the Board members of the PPT expected to have a copy of the CCMC report. The Parent had the lengthy report at the hearing with sections blacked out. The Parent refused to sign a release to allow the Board to obtain the complete report and confer with the CCMC evaluators. The Parent verbally summarized the report scores, but did not share the complete report with the Board. [Testimony Ms. Rosenfield, Exhibit B-105] The Board received five pages of the tables of scores from the CCMC report. [Exhibit B-103] These scores were not received until November 2004, when the Parent submitted the scores to the Board director at a subsequent PPT meeting. The narrative portions of the report were never provided to the Board. [Testimony Ms. Rosenfield]
32. As a result of the June 10 PPT meeting, the Board's attorney attempted to continue the scheduled hearing dates in the first due process request [Case No. 04-069] so that the Board could continue to attempt to obtain the complete CCMC evaluation report from the Parent. That request for continuation was denied, and the case was dismissed without prejudice. [Exhibit B-106]
33. Throughout the Student's fourth grade year, the Student continued to have behavioral concerns. He would taunt and push other students, and was continually disruptive. He had difficulty focusing. There were concerns regarding gaps in the Student's math. [Testimony Ms. Rosenfield] The Student continued to be enrolled in the Talented and Gifted Program [TAG] based on his IQ, even though he had met with no success in the program, even on an individual basis. Knowing that children with exceptional IQs might have social deficits, the TAG teacher felt the Student belonged in TAG, although there was a great deal of frustration in that it was difficult to connect with the Student. [Testimony Mr. Powers]

34. In some of the standardized assessments, the Student did experience some growth, but his day to day work was marginal to remedial, even with all of the individual attention the Student received in fourth grade from the classroom teacher and the aide. [Testimony Mr. Powers]
35. Early in the Student's fifth grade year in the 2004-2005 school year, the Board principal filed a referral to special education. [Testimony Ms. Rosenfield, Exhibit B-113]
36. The Board director of special education observed the Student in September 2004, and noted that the Student repeatedly poked others, called them names and taunted them. He was very rarely on task, and was disconnected with his peers. He also made remarks that concerned the director, regarding his own self esteem. The Student would refer to himself as a bad boy, and bang his head on the table. He also played with pencils, lining them in a visual way which appeared to be calming to him. He shouted out in class that he knew something about a subject that was being discussed, but when called upon by the teacher, he stared blankly in front of him, even when the teacher attempted to draw him out. [Testimony Ms. Rosenfield]
37. In fifth grade, the Student had an aide assigned to him. [Testimony Mr. Powers] At this time, the teachers were still reporting these difficulties regarding the Student's behavior and his inability to do schoolwork commensurate with his intellectual ability. [Testimony Ms. Rosenfield, Mr. Powers] In his specials, the Student consistently exhibited difficult behaviors in fifth grade, including touching other children and in disrupting the class. [Testimony Mr. Powers]
38. In fifth grade, the Student took the Connecticut Mastery Tests, and did very poorly. His scores were close to the bottom of fifth grade for the school district, test results that would not be expected for a student with such a high IQ. [Testimony Ms. Rosenfield, Exhibit B-116] The Student scored in intervention in 4 of 5 tests, and he was the lowest performing student on two of the tests of all of the fifth graders in his school. [Testimony Mr. Powers]
39. On September 27, the Parent was sent a Notice of Planning and Placement Team Meeting to be held on October 7, 2004. [Exhibit B-115] On October 6, the Parent notified the Board via email that she was unable to attend the PPT meeting scheduled for the following day. She requested that it be rescheduled for November 8, 15 or 22. [Exhibit B-118]
40. The Board notified the Parent that postponing the PPT until November would significantly delay the PPT's ability to discuss referral and make recommendations for evaluation, and proposed four dates in October for the rescheduling of the PPT meeting. [Exhibit B-119]

41. On October 14, the Board rescheduled the PPT meeting for November 8 at the Parent's request, and also noted that the Parent should contact the Board if any of the earlier dates became available for the Parent to proceed with the PPT meeting. [Exhibit B-120a², B-121]
42. Also on October 14, the Board principal sent notification to the Parent that the Student had been given a half day in school suspension on October 13 due to the following behaviors that the Student had during the fifth grade field trip on October 12: fighting or improper contact with other students, exhibiting a disruptive attitude or conduct, using obscene language or gestures, refusing to obey directives from staff or school rules, entering or leaving an assigned area without permission and exhibiting sexual harassment. [Exhibits B-123, B-120] At that time, the Student wasn't remorseful of his actions on the field trip. [Testimony Mr. Powers]
43. On October 14, the Student was given a classroom assignment to write a narrative essay of "if I were six inches tall." The Student wrote an essay that he would tie up another student's shoe laces, put mouse droppings in his food and tacks in his shoes. The Student then illustrated the injured fellow student. This type of violence depicted in the essay and accompanying illustration concerned the principal. The Student did not have a tumultuous relationship with the other student portrayed in his essay. The intense dislike of the other student in question was disconcerting and indicated troubling signs, according to the Board principal. [Testimony Mr. Powers, Exhibit B-124]
44. On November 2, the Board sent a notice to the Parent that it had developed a behavior management plan to structure its responses to the Student's behavioral difficulties in a way that provides him consistent feedback, clear consequences and positive reinforcement. The Board acknowledged, in the notice, that the Parent refused to allow a behavioral plan, but informed the Parent that it was the school's responsibility and obligation to assist the Student in his social and behavioral skills as well as the continuing progress in academic areas. [Exhibit B-29]
45. On November 8, the PPT meeting was held. The team reviewed the referral concerns which were consistent with all four of the Student's teachers. The Board members of the PPT again requested that a comprehensive evaluation be completed, and the Parent refused consent, indicating that the Student had already been fully evaluated, privately. The Board staff indicated that it had not been given the report, and that a verbal summary by the Parent was not sufficient to make an eligibility determination. The Parent presented the PPT with the scores-only portion of the report. The Parent also requested that the Board consider allowing her to conduct another private evaluation at her own expense at Yale. The Board did not agree with this proposal, and continued to recommend the

² This letter of October 14, 2004 from Mr. Powers to the Parent was included in the Board's exhibits, but not numbered. As it was placed between B-120 and B-121, it is numbered B-120a.]

evaluation by the Board, as proposed. The Parent was given the form to consent to the initial evaluation. She refused to sign the consent for the evaluation.
[Testimony Ms. Rosenfield; Exhibits B-131, B132]

46. While the Board could not fully analyze the CCMC report, as it was only given the scores of standardized assessments, the Board director noted that while the full scale IQ was at 127, the standard scores in math were low on the CCMC scores. In addition, none of the scores submitted to the Board by the Parent included any rating scales, observations, summary, or any attention, emotional or behavior scales that were administered, although the teachers had completed the rating scales. [Testimony Ms. Rosenfield]
47. Overall, the frequency of the behavioral difficulties with the Student is far greater than any other student in the school building, and even greater than the collective difficulties of the students in the school, and that also was disconcerting to the principal. The Board has taken numerous and exhaustive attempts to have different regular education interventions and strategies for the Student, with no success. [Testimony Mr. Powers]
48. On December 3, 2004, the Board filed this request for a due process hearing to override the Parent's lack of consent to the evaluations. [Exhibit B-136]
49. On the hearing date, the Student was not attending the Board schools. The Parent had not notified the Board that the Student was being withdrawn from the Board schools, but the Board had received a letter from Sacred Heart in Groton that the Student had enrolled there after the Christmas vacation. [Testimony Ms. Rosenfield]

CONCLUSIONS OF LAW:

1. The Board has an affirmative and ongoing obligation to identify, locate and evaluate all children with disabilities residing within its jurisdiction who have or are suspected of having disabilities. 20 U.S.C. 1412(a), 34 C.F.R. 300.125(a), 300.220(a) Before a child can be placed in a special education program the school district must conduct a comprehensive evaluation of the Student 34 C.F.R. Sec. 300.531. As part of that process the school district must secure parental consent for the evaluation. 20 U.S.C. Sec. 1414 (a)(1)(C); 34 C.F.R. Sec. 300.505 (a)
2. The Board is seeking to evaluate the Student to determine eligibility and an appropriate program for the Student. In conducting its evaluation, the Board must ensure that a complete evaluation study is completed. Conn. Agencies Regs. Sec. 10-76h-9(a) The evaluation study shall include reports concerning the child's educational progress, structured observation and such psychological, medical, developmental and social evaluations as may be appropriate in determining the

nature and scope of the child's exceptionality. Conn. Agencies Regs. Sec. 10-76h-9(a)

3. It is the obligation of the PPT to review existing assessment data regarding a child and to determine whether additional information is necessary in order to program for the child. Initially the PPT reviews existing evaluation data and identifies what additional data, if any, are needed to determine (i) whether the child has a particular category of disability, as described in Sec. 300.7, or, in the case of a reevaluation of a child, whether the child continues to have such a disability; (ii) the present levels of performance and educational needs of the child; (iii) whether the child needs special education and related services, or, in the case of a reevaluation of a child, whether the child continues to need special education and related services; and (iv) whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general curriculum. 34 C.F.R. Sec. 300.533(a)
4. In this case the Board has taken many steps to attempt to provide appropriate regular education intervention to the Student, to no avail. The Student's academic and behavioral performance have continued to decline. Since the first month that the Student was enrolled in the schools, there have consistently been academic and behavioral problems reported about the Student. The Student has been seen as disconnected with his peers and unable to maintain appropriate physical boundaries. It has been noted that the Student has a lack of focus and attention, and an inability to maintain self control. These behaviors have impaired the Student's educational performance, and the Student has been unable to demonstrate academic achievement, particularly in light of his high intellectual ability. A comprehensive evaluation is essential for the PPT to determine whether the Student is eligible for special education and related services.
5. The Board has acquiesced to parental requests and demands since the Student has been enrolled in the Board school. At the Parent's request a placement assessment was completed, and the Student was placed from second to third grade in response to the Parent's concerns that the Student be challenged academically. The Board did not implement a behavioral intervention plan for the Student in fourth grade, due to the Parent's objection to such a plan. The Board waited for completion of the Parent's evaluation of the Student, and attempted to work with the Parent to secure the results of the CCMC evaluation, without success. The Board must now proceed despite the Parent's lack of consent to a comprehensive evaluation of the Student.
6. The Parent has revoked her consent to the evaluation of the Student, and has continued to refuse consent for the evaluation. The Board is entitled to the requested evaluation in order to ascertain whether the Student has a disability and to determine his level of functioning, pursuant to 34 C.F.R. Sec. 300.533(a)(2)

7. In the absence of parental consent for evaluations, hearing officers may order special education evaluations without the consent of the parent. Conn. General Statutes Sec. 10-76h(d)(1) The federal regulations specifically indicate that when the parent of a child with a disability refuses consent for initial evaluation or a reevaluation, the Board may continue to pursue evaluations through the due process procedures. 34 C.F.R. Sec. 300.505(b) The Board has appropriately brought such a request, and the evidence supports that a comprehensive evaluation of the Student is necessary to identify whether the Student is eligible for special education, and determine the Student's special education and related service needs. 34 C.F.R. Sec. 300.532(h)

FINAL DECISION AND ORDER:

The Board shall be permitted to conduct a comprehensive evaluation of the Student.