

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Wallingford Board of Education v. Student

Appearing on Behalf of the Parent: Attorney Nickola J. Cunha
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Appearing on Behalf of the Board: Attorney Fredrick Dorsey
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Appearing Before: Attorney Justino Rosado, Hearing Officer

ISSUE:

1. Should the Board be allowed to perform initial evaluations on the Student in the following areas academic, intellectual, speech and language, social work, occupational therapy and physical therapy?

FINAL ORDER AND DECISION

SUMMARY:

The Student is a 9 year-old young man who is currently in the third grade and who has not been identified as a student requiring special education and related services as defined in the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. §1401 et seq. and Connecticut General Statute §10-76a. The Student's kindergarten, first-grade, second-grade, and third-grade teachers have all observed issues regarding the Student's social and physical awkwardness and a deterioration of the Student's reading abilities. The Student was referred to a planning and placement team ("PPT"), which recommended initial evaluations in the areas of academics, intellectual achievement, speech and language, social work, and occupational and physical therapy. The Parents refused to consent to these evaluations and the District filed for due process, seeking an order allowing it to perform the recommended evaluations of the Student.

Procedural History:

This matter was presented as a contested matter pursuant to Connecticut General Statutes (CGS) §10-76h and related regulations, 20 United States Code §1415(f) and related

regulations, and in accordance with the Uniform Administration Procedures Act, CGS §§4-176e to 4-178, inclusive, and 4-181a and 4-186.

The Board requested this due process hearing in a letter dated November 19, 2007 and received by the Parent on or about November 20, 2007. (Hearing Officer's Exhibit¹ -1) A pre-hearing conference was held on December 7, 2007 at which time hearing dates of January 9 and January 22, 2008 were selected at the convenience of the parties. The January 9, 2008 hearing date was cancelled at the request of the parties.

The Parents called one witnesses in their direct case. The Board called six witnesses in their direct case and no witness on rebuttal. Throughout the hearing, the Student was at the Board's school placement.

At the close of the evidentiary hearings on January 22, 2008, the parties were given the opportunity to file briefs. The parties agreed that the Briefing schedule would begin when the Parents received the transcript they requested. The Parents were to notify the hearing officer when the transcript was received. Notice of receipt of the transcript was not sent to the hearing officer. The Parents' attorney objected to observation reports being entered in as Board exhibits. The objection was overruled and the exhibits were received as full exhibits. The Parents did not enter any exhibits.

The date for the mailing of the Final Decision and Order was extended to April 10, 2008 in order to accommodate the hearing dates and the filing of Post Hearing Briefs.

This Final Decision and Order sets forth the Hearing Officer's summary, findings of fact and conclusions of law. The findings of facts and conclusions of law set forth herein, which reference certain exhibits and witness testimony, are not meant to exclude other supported evidence in the record. To the extent that the summary and findings of fact actually represent conclusions of law, they should be so considered and vice versa. SAS Institute Inc. v. S. & H. Computer Systems, Inc., 605 F.Supp. 816 (M.D.Tenn. 1985) and Bonnie Ann F.v. Callallen Independent School Board, 835 F.Supp. 340 (S.D.Tex. 1993).

FINDINGS OF FACT:

1. The Student is a seven year old young man who is currently in the third grade of the Board's school and is not eligible to receive special education and related services under IDEA 20 U.S.C. 1401 et seq. and Connecticut General Statute §10-76a.
2. During the Student's kindergarten school year, he demonstrated difficulty with his fine motor skills. His teacher noted that the Student had difficulty keeping pace with his peers and this inability was having an adverse effect in his school program. (Board Exhibit-9)²

¹ Hearing Officer's Exhibits are referred to as "HO" followed by the appropriate exhibit number.

² Hereafter Board Exhibits' are referred to as "B" followed by the appropriate exhibit number.

3. During the Student's 1st grade school year, his teacher requested that the occupational therapist, physical therapist and the speech and language therapist observe the Student in the classroom. The occupational therapist observed that the Student needed verbal prompts to complete his tasks, was very distractible and got out of his seat for no apparent reason. The physical therapist noted that the Student demonstrated delayed gross motor skill development, lacked motor coordination and decreased dynamic balance skills. The speech and language therapist observed that the Student's speech was disfluent, showed disarticulation and required redirection in order to complete the task. Based on the observations at a PPT, they recommended evaluations. (B-7, B-8, B-10)

4. A PPT was convened on February 6, 2006. The Parents refused to attend the PPT. The PPT team recommended the evaluations of the Student and that he attend a weekly recess group with the social worker. The recommendations were sent to the Parents with their procedural safeguards. The Parents refused consent. (B-12)

5. The Student showed good progress during his 1st grade school year. The teacher observed that the Student had some difficulties working with a group, completing fine motor tasks and demonstrated writing organization issues. (B-13)

6. On October 31, 2006, the Student's 2nd grade teacher recommended an Early Intervention Plan (EIP) meeting in order to obtain advice to help the Student be successful in school. The EIP is a support system for classroom teachers to support Student learning. The Parents were informed about the EIP and its recommendations. The Parents were asked to contact the teacher. There was a follow up EIP meeting in December 2006 in order to see if strategies implemented were successful. The EIP recommended a PPT in order to seek evaluations of the Student. The Parents refused to attend the PPT or give permission for the evaluations. (Testimony of 2nd grade Teacher, B-16, B-20, B-21)

7. The Board attempted different strategies to assist the Student in his regular education program:

- a. Stress release exercises for his hands.
- b. Anxiety relieving exercises.
- c. Talking points to use when speaking.
- d. Taking breaks
- e. Leg rubbing.

(B-20, B-23)

8. On November 28, 2006, the speech and language therapist again observed the Student in the classroom, noting that the Student was difficult to understand and that his speech was rapid with low volume. As a result of her observations, the speech and language therapist recommended a formal speech and language evaluation of the Student. The EIP team met again on December 19, 2006 and recommended setting a PPT meeting to have the Parents reconsider their prior denial in having him evaluated. (Testimony of Speech and Language Therapist, B-19)

9. The Student's report card does not indicate any physical problems or any significant communication problems in expressive ideas. The Student's 2006-2007 school grades were all average or above. The Student was advanced to the third grade. (Testimony of 2nd grade Teacher, B-34)
10. The Student was referred to a PPT by his current third grade teacher. The Student was average to above average academically but showed difficulties in his writing skills. His teacher expressed concerns to the mother about the motor problems the Student was demonstrating in class. The Student showed difficulties cutting paper, getting up from the floor and going down the stairs. (Testimony of Third Grade Teacher)
11. During the 2007-2008 school year, the Board contacted the physical therapist to do an observation of the Student. The therapist made 2 observations of the Student. During December of 2007 and January of 2008, the physical therapist observed the Student in his physical education class to determine if he needed a physical therapy evaluation. The therapist noted problems with the Student's motor strength and that he could not do skipping or run properly. She felt that an evaluation for gross motor development would provide information regarding the Student's motor skills and coordination and give a good starting point for therapy sessions. She further indicated that a sensory profile would show how the Student processes information through his five senses, and perhaps explain his stress levels, covering his ears when the fire alarm was used, and his difficulty getting up from the floor and managing the stairs. (Testimony of Physical Therapist)
12. The occupational therapist, an employee of Easter Seals contracted to work with the Board, attended the Student's January and October of 2007 PPT meetings. The therapist had observed the Student in 2nd grade and also observed the Student in his 3rd grade classroom. Based on her observations and PPT discussions, she felt that the test of visual motor integration would address the issues she and all the Student's classroom teachers had observed regarding the Student's problems in attention to detail, eye/hand coordination and handwriting. (Testimony of Occupational Therapist)
13. The Board's speech therapist observed the Student in his third-grade classroom and reviewed his work product from that class. She noted that his work product was unorganized, with numerous grammar errors, and that his written language was below grade level. The therapist felt that the Test of Written Language (TOWL) would generate a strong profile of the Student's grammar and organization skills and provide information on his expressive thought and attention issues. (Testimony of Speech and Language Therapist)
14. The school social worker has been observing the Student since kindergarten. The social worker stated that the Student appeared nervous and in recess his interaction with other students was limited and usually he was by himself. Since anxiety and socialization impact on the Student's education, it was her recommendation that the

Student be evaluated. The social worker never spoke with the Parents. (Testimony of School Social Worker)

15. The school psychologist, who has worked with the Student since he was in the second grade, observed the Student in his second and third grade classrooms. She also reviewed prior observations during the Student's kindergarten and first grade years. Her observations of the Student and discussions with his classroom teachers indicated that an IQ test would provide the Board with accurate information regarding the Student's learning achievement in comparison to his potential. She also felt this testing would provide more information regarding the Student's anxieties and would assist in determining whether his issues were academically or emotionally based. The evaluation would provide information of the Student as a learner, his strengths and weak areas. (Testimony of School Psychologist)

16. The Student communicates well and is eager to please. At home, he does his homework and he does not receive any extra homework to correct any deficiencies. The Student does not exhibit any difficulties walking and his doctor has observed the Student and does not recommend any testing. The Parents object to any recommended testing. (Testimony of Father)

17. The Parents had given the Board permission to speak with the Student's doctor. Before the Board could speak to the doctor the Parents withdrew permission. (B-31, B-32)

18. The Board attempted various times to conduct a PPT, but the Parents were not available. On October 29, 2007, a PPT was convened and the father attended. The PPT again recommended evaluation of the Student in academics, speech and language, occupational therapy, and physical therapy, as well as a social work evaluation to address the Student's anxieties and issues with peer relations. The Parents again refused to consent to the evaluations. (B-30, B-33)

CONCLUSIONS OF LAW:

1. The parties do not dispute that currently, the Student is not eligible for a free and appropriate public education ("FAPE") with special education and related services as set forth in the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. Sec. 1401, et seq. and the Connecticut General Statutes (CGS) Sections 10-76 et seq.
2. Each board of education is responsible for the identification of children requiring special education and related services. This responsibility shall include cooperating with other agencies in a position to identify children requiring special education and related services. Determination of a child's eligibility to receive special education and related services shall be based on documented evidence, as required by these regulations, that the child requires special education. CGS § 10-76d-6, 20 U.S.C. Also IDEA clearly states that "All children with disabilities

- residing in the State, regardless of the severity of their disabilities, and who are in need of special education and related services, are [to be] identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services." 20 USC Sect.1412(a)(3)(A)
3. The Board did not hastily conclude that the Student required evaluations in order to be able to receive an appropriate education. The Student's teachers attempted to rectify any shortfalls in the Student's educational progress by conducting EIPs. The strategies recommended at these EIPs were utilized by the Student's teachers. (Finding of Facts #7) Only when these strategies were not showing the expected progress were further evaluations recommended to the PPT. The Parents allege that the observations conducted and reports presented by the physical therapist, occupational therapist, speech and language therapist and the social worker were evaluations conducted by the Board without parental consent and therefore a violation of the Student's procedural due process. IDEA provides that "The screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services." 34 CFR § 300.302. The observations conducted and reports presented were not evaluations that would require parental consent but observations and were not procedural violations.
 4. The new IDEA maintains the requirement for obtaining informed parental consent for an initial evaluation in 20 USC §.1414(a)(1)(D)(i)(II). The law adds language regarding "consent for services" as follows, "An agency that is responsible for making [FAPE] available to a child with a disability ... shall seek to obtain informed consent from the parent of such child before providing special education and related services to the child." If the parent doesn't provide consent for initial evaluation under clause (i)(I) or fails to respond to a request for consent, the LEA may initiate a request for a due process hearing, except to the extent inconsistent with state law. 20 USC §.1414(a)(1)(D)(ii)(I) In this matter the Parents refused to provide consent for an initial evaluation. (Findings of Facts # 6, 8, 16 & 18)
 5. The Student's academic records demonstrate that he is making academic progress, but progress is not measured just by a student's grades. The Student has shown deficits in socialization, communication, gross motor skills, sensory deficits and anxieties. The Parents' attorney in the Parents' Post Hearing Brief, places the criteria for an evaluation as "significant delays." "Significant delays" is a criteria of a student who requires special education and related services as mandated in IDEA. 34 U.S.C. §1401 (3)(B)(i) C.G.S. § 10-76a(6) This would require an evaluation of the Student. The school personnel who observed the Student found deficits in the Student that led them to recommend evaluations. Based on the observations and recommendations of the professionals, the PPT recommended that the Student be evaluated in the recommended areas. I agree with the PPT's recommendation that the Student be evaluated in the recommended areas. This

does not mean that the Student is a student that is eligible for a free and appropriate public education ("FAPE") with special education and related services as set forth in the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. Sec. 1401, et seq. and the Connecticut General Statutes (CGS) Sections 10-76 et seq. This just means that the Student should be evaluated and once the evaluations are completed, the PPT, which the Parents are an integral part, will reconvene and review the findings of the evaluations and then and only then make a recommendation as to the Student's eligibility to special education.

6. To the extent a procedural claim raised by the Parents is not specifically addressed herein, the Hearing Officer has concluded that the claim lacked merit.

FINAL ORDER AND DECISION:

1. The Board shall perform initial evaluations of the Student, as had been recommended by the October 29, 2007 PPT, in the following areas:
 - a. Speech and Language;
 - b. Occupational Therapy;
 - c. Physical Therapy;
 - d. Social Work;
 - e. Intellectual; and
 - f. Academic.
2. The evaluations shall be done at the Board's expense.
3. Two weeks after the evaluations have been completed; the Board shall convene a PPT to review the recommendations of the evaluations.